

FLOW CONTROL ACT OF 1994

Y 4. P 96/10: S. HRG. 103-722

Flow Control Act of 1994, 103-2 Hea... **RING**
RE THE

SUBCOMMITTEE ON
SUPERFUND, RECYCLING, AND SOLID WASTE
MANAGEMENT

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 2227

A BILL TO AMEND THE SOLID WASTE DISPOSAL ACT TO PROVIDE CON-
GRESSIONAL AUTHORIZATION OF STATE CONTROL OVER TRANSPOR-
TATION OF MUNICIPAL SOLID WASTE, AND FOR OTHER PURPOSES

JULY 13, 1994

Printed for the use of the Committee on Environment and Public Works



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FLOW CONTROL ACT OF 1994

WEDNESDAY, JULY 13, 1994

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND, RECYCLING AND SOLID
WASTE MANAGEMENT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:00 p.m. in room SD-406, Dirksen Senate Office Building, Hon. Frank Lautenberg (chairman of the subcommittee) presiding.

Present: Senators Lautenberg, Durenberger, Warner, Faircloth, and Mitchell.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. We are going to call the subcommittee to order and consider the legislation dealing with flow control.

Basically, those of you in this room know only too well what flow control is. It is rather arcane to those who aren't familiar with the subject and there is all kinds of speculation about what it means, but we're not going to get into that. The fact is, what we're dealing with is the ability of a State's local government to determine where trash will be sent, where do we direct our garbage. And while it doesn't sound like a particularly complicated problem, it has become increasingly so.

Communities in New Jersey and 42 other States face chaotic conditions because of a recent Supreme Court decision which struck down a local New York State flow control law. The court held that since the Congress has not specifically delegated this power to the States, the law violated the interstate commerce clause of the Constitution. Flow control laws are used commonly throughout the country. Waste in New Jersey has been flow controlled, managed if you will, since 1982. Given the reliance on flow control procedures to regulate garbage, communities across the country are now worried about the Supreme Court decision. Obviously, it is because it creates a great deal of uncertainty about where they are going to send their trash and what prospects are for long-term comprehensive good management.

First, the decision makes it difficult for communities to be able to guarantee that there will be a steady stream of waste sent to disposal and processing facilities. Without this guaranteed steady stream, it will be virtually impossible for communities to get the financing to build solid waste management facilities and, further, to be able to maintain the revenue flow that is necessary to deal

with existing obligations based on assumptions that flow control procedures were, in fact, going to be maintained. In New Jersey, it threatens our program to eliminate exports and become self-sufficient in garbage management by the end of the decade. That's really what everybody is looking for.

Second, this decision could result in localities having lost revenue that was generated by having garbage specifically sent to municipal disposal facilities. And this, as I earlier said, would eliminate their ability to subsidize non-profitable waste management activities such as recycling and household hazardous waste programs. We need to increase recycling efforts. But the loss of flow control authority threatens existing efforts and would make an expansion of recycling programs much less likely.

Finally, the Supreme Court's decision puts existing bonds used to finance waste management facilities at significant risk. If localities cannot send an adequate level of trash to a facility to generate the revenue needed to pay off the bonds, obviously they face default and citizens in the affected communities face the possibility of ever-increasing high taxes.

A few weeks ago Senator Mitchell joined me in introducing S. 2227, the Flow Control Act of 1994. S. 2227 gives the State and local Governments authority to use flow control to manage all of their residential garbage. Communities which were flow controlling other types of waste before the Supreme Court decision would be authorized to continue flow controlling that waste. Existing flow control designations would be protected under our legislation.

S. 2227 also ensures that there will be private sector competition for waste management operations selected pursuant to a flow control authority.

And finally, S. 2227 establishes two principles which are very important to the continued growth of the recycling industry. First, recyclables diverted from the solid waste stream are not considered as solid waste; and second, local governments generally will not be allowed to take control of recyclable materials not voluntarily given up by their owners. The recycling provisions of my bill encourage future private involvement in the collection of recyclables and thereby help local governments divert more material from landfills.

This legislation doesn't give anybody everything they would like to see. Other bills do more to meet the demands of this group or that group with their particular interest. But what we tried to do in my bill is to give everyone what they needed—a legal, rational, dependable system for managing waste. If we allow this legislation to be held hostage to specific group interests who want to tweak a little bit more here or there, then we might not have any bill at all.

We're near the end of this Congress. Communities across the country need the certainty that this bill provides. They can have that certainty but only if we respect the compromises that have been reached on this issue and leave the fight over fine tuning to yet another time.

Today we are going to hear witnesses from the public sector and from the waste industry to discuss their points of view on flow control. I plan to keep the record open for others to submit written

testimony. I look forward to hearing from our witnesses, but would now call on my colleague, the distinguished ranking member of this subcommittee, Senator David Durenberger.

OPENING STATEMENT OF HON. DAVE DURENBERGER, U.S.
SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. Mr. Chairman, I thank you and I apologize for being late. I do particularly appreciate, this late in the session, your having this hearing. You have already acknowledged how important to you and to the constituents you represent flow control is. It certainly is important to people in Minnesota and local and State Governments throughout the country. I want to extend my particular appreciation and welcome to my friend Randy Johnson, Hennepin County Commissioner in Minnesota, for being here today. Not only is he an exemplary public servant, but I don't know anybody in America who knows this issue as well as he does. He does have a viewpoint, you may not agree with all of it, Mr. Chairman, but one thing you will never be able to argue is that he doesn't know the subject. He has actually been through it.

Back in May of 1992, the full committee voted to approve flow control for local governments when it adopted my amendment to Senator Baucus' RCRA reauthorization bill. Had it become law then my flow control amendment would have assured local governments the authority they need to protect human health and the environment. Unfortunately, it did not become law and over the last 2 years little has changed in regard to the issue except the urgency for action.

Today there are billions of State and local dollars at stake because of the Supreme Court's recent decision in *Carbone*. In my State of Minnesota alone, that amount of debt stands at \$325 million; nationwide, it is as high as \$18 billion.

Few I think would seriously argue that Congress doesn't have responsibility to fix the inequitable result. In fact, I have read that those who have argued that the problem can be fixed if only local governments would just raise taxes. We also know that is not the solution. Local governments that have made an investment in waste flow control deserve some protection. They also, I might say, deserve some encouragement. Importantly, the bill that I offered with Senator Heflin and the bill that you have offered recognize this point.

In the past, this committee and the Congress and many State and local Governments have endorsed the hierarchy for the safe management and disposal of waste. It is that hierarchy that encourages source reduction, recycling, treatment in highly engineered disposal facilities. But as State and local Government officials will attest, moving up the hierarchy isn't easy. It requires substantial planning, significant up front capital investment, and occasionally higher consumer charges. It is here that flow control has been an essential tool in making possible the investment for better waste management and disposal.

The problem is that if we protect only those local governments with existing flow control designations, we are going to foreclose opportunity for other local governments across America who have

not yet designated their waste to achieve that same important goal—improved waste disposal standards. This is especially true in many rural areas of my State and throughout the Nation. Without flow control, these areas must settle for the lowest level on the waste disposal hierarchy, and we know that in this committee so well—landfills. None of us wants that result.

The fact is without flow control guaranteeing a certain waste stream, local governments can't afford to build or contract for facilities and private waste managers won't because for them it turns out not to be profitable.

Mr. Chairman, when you talk about a specific group tweaking here and there that might hold this up, those are groups that represent the same Americans we do. That's the counties, that's the cities, that's a whole lot of people with a problem. Some of us at least are prepared to see, as you are, that this result comes out appropriately. But I think between us, and I know there are other people that probably don't want to see a resolution to this issue, but somehow between us it seems to me we have to find a solution to this problem.

I got into this in part because I believe in competition. I am arguing now in health care for something called "managed competition". But I have got to tell you, and maybe we will find out today, when I look at a map of Cook County and I see two competitors with a line down the middle, one is on one side and the other one is on the other side, folks, that ain't competition. If that is what's going on around America, don't argue that there is competition and from competition we're going to get better service, lower prices, and so forth. So maybe those of you who are part of some of that competition can demonstrate to somebody who really believes in markets, believes in competition that there is a responsible competitive alternative available to us.

Senator LAUTENBERG. Thank you very much, Senator Durenberger.

Senator Warner.

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. I think this is a very important subject. I certainly agree with that part of the legislation respecting the grandfathering of communities with facilities to date. Fairfax, Arlington, Alexandria, localities in my State, were highly dependent on these facilities which have been erected, financed with bonds that must be paid off. And without this grandfathering, that financing and other arrangements will be put in jeopardy.

As we look to the future, Mr. Chairman, again I feel that we should do something, but I am uncertain at this point in time exactly what we should do. There is a necessity to continue to allow localities to erect these facilities and finance them but, at the same time, not let communities have a monopoly. Somehow the marketplace has got to have a voice and show, frankly, competition as to how they might be able to do it differently and equally effectively to the municipality. And I am pleased that we have before us some

talent that may be able to shed light on those issues for this Senator.

Senator LAUTENBERG. Thank you very much.

One thing seems certain; that is, all of us agree that this is pretty important. I would tell you from the reports that I read about what goes on within the State of New Jersey and differences between municipalities, county Governments, State Government, I assume that is replicated in lots of parts of the country.

Senator DURENBERGER. Mr. Chairman, could I ask unanimous consent that a statement by Congressman Chris Smith and a statement from Mercer County, New Jersey, be included in the record. (See pp. 78, 85.)

Senator LAUTENBERG. Without objection, so ordered.

We will call on the witnesses. But before we proceed, I see we have another colleague who has joined us. Do you want to make a brief opening statement?

OPENING STATEMENT OF HON. LAUCH FAIRCLOTH, U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator FAIRCLOTH. Thank you, Mr. Chairman, for giving me the opportunity. The importance of this issue is obvious to all of us. Thousands of communities across the country and in North Carolina have had their waste disposal strategies, they've built expensive plants and they have had it trashed by the recent Supreme Court decision. Some 88 to 100 counties in North Carolina have written me and petitioned me to support flow control. Waste disposal officials from North Carolina were in my office the other day and were desperate for Washington to give back to them the authority to direct their municipal waste. They made a convincing argument that they cannot meet the financial regulatory environmental demands of their jobs without flow control. They have essentially had the legal rug pulled out from under them.

Among the arguments that they bring forth are: Taxpayers are going to be forced to pick up the tab to pay for the deficits run by public facilities that no longer receive sufficient waste flow to pay for them. Most of the towns at home have spent a fortune in building these facilities and now trash is simply moving around them. As in the case of Charlotte, North Carolina, taxpayers must pay the full fill contractual obligations the city made with a private disposal facility.

Flow control is needed to meet State waste laws. North Carolina's law established mandates in which instances cannot be met without the ability to control trash flow. I think some of the State recycling mandates don't make common sense, but we owe communities the legal framework to meet the obligations.

In short, the rules were changed in the middle of the game for local governments and we need to change them back. What we have now is nothing short of chaos for local governments in their attempt to control waste management. That, we simply cannot put up with. Thank you.

Senator LAUTENBERG. Thank you very much, Senator Faircloth.

With that, we would like to hear now from the witnesses. We will allow you 5 minutes to make your oral statement. The full written statement, if you have one, will be included in the record.

With that, we would like to hear first from Commissioner Johnson.

STATEMENT OF HON. RANDY JOHNSON, COMMISSIONER, HENNEPIN COUNTY BOARD OF COMMISSIONERS, MINNEAPOLIS, MINNESOTA

Mr. JOHNSON. Thank you, Mr. Chairman, Mr. Durenberger, members of the subcommittee. My name is Randy Johnson and, like you, I am an elected official, a county commissioner from Hennepin County, Minnesota. And I am also here today representing the National Association of Counties, the National League of Cities, and the Solid Waste Association of North America.

Thank you for this opportunity to address the issue of solid waste flow control from the perspective of local officials. In most States, it is government officials at the local level who traditionally have been and often by law are now responsible for disposing of our garbage safely and economically.

Until very recently, everyone assumed that along with local governments' responsibility to decide how best to dispose of our solid waste came the authority to control the flow of the waste generated within our local jurisdictions. As you know, the recent U.S. Supreme Court decision and some other lower court decisions, some of them from my own State, suddenly changed that. When garbage was put on barges and trains just a few years ago nobody wanted it. Today it is a commodity and platoons of lawyers argue over who has the right to it.

Flow control is a very important environmental issue for local governments. That is why strong flow control legislation is supported by all of the national organizations representing local governments. In the next few minutes I would like to explain how we used flow control in Hennepin County to build what is considered one of the most successful integrated waste management systems in the Nation and why you should reject claims of those trying to stop congressional action that will clarify that local governments have authority to control solid waste generated within its own borders, that all local governments should have that authority.

Last year in Hennepin County, a county of 1.1 million people, we recycled and composted 48.5 percent of our solid waste that previously had been buried in landfills. Less than 2 percent of our waste was unprocessed and sent to landfills. Most of the remainder was sent to modern waste-to-energy plants. What accounts for our success in handling our solid waste in Hennepin County the way almost every serious environmentalist says it should be handled? Why were we able to recycle and compost 50 percent of our waste when other communities struggled to reach even 20 percent? The reason was simple—it was the law. Or at least it was the law until court decisions of the past few months.

Our flow control ordinance assured virtually all solid waste from both commercial and residential generators went to waste processing. In other States, transfer stations might be used. Hennepin

County imposed a per ton surcharge on the amount that every hauler paid to tip garbage at our designated facilities. And that surcharge paid most of the cost of curbside collection of recyclables in virtually every single family residence every week. Now with flow control being in jeopardy, we are looking at having to dismantle that funding system and our only other real source of funding is property taxes.

In other parts of the country flow control has been used to minimize and to reduce illegal dumping. It has been used to manifest and take control of waste to minimize dumping in rural areas.

We hear from some that flow control ordinances are monopolistic or anti-competitive. In fact, flow control ordinances increase competition. They increase competition among haulers. When all haulers have to pay the same disposal fee, there will be increased competition among those haulers who are collecting.

Flow control ordinances allow local governments to plan for future waste management capacity that might be different in different parts of the country based on population and density of population. It is an issue of fairness for local governments that have already built facilities, but it is also an issue of fairness for local governments who have been unsure whether they have authority to move forward and build these facilities.

Lack of sound flow control results in waste moving to less environmentally sound facilities because they are almost always cheaper. Flow control is much less disruptive to the marketplace than removing waste collection services from the private sector in order to remove that market incentive to deliver waste to less environmentally sound facilities.

I understand that representatives from the State of New Jersey are negotiating certain changes in S. 2227 and those changes, if accepted, will remedy the primary issues raised by the various local government units.

NAC as well as the broad coalition of organizations working with us request that Congress enact legislation consistent with these principles. First, local government must have the option to use flow control over all municipal solid waste, residential and commercial. Second, we're pro-environment and pro-recycling. Individuals should be free to make their own arrangements to divert their own recyclable materials from the waste stream. And we're pro-competition. Flow control legislation should guarantee the private sector the right to compete for contracts whenever State and local governments enact new flow control laws.

Perhaps for us the most important part of the *Carbone* decision is Justice O'Connor's concurring opinion wherein she said Congress has implied, assumed, suggested that local governments have flow control authority but that Congress has never specifically unequivocally said so. Now is the time for Congress to do so. Now is the time for Congress to reinforce that this traditional police power of local governments is a power that's alive and well in the United States.

Thank you for your time and attention. I will be happy to address any issues or any questions.

Senator LAUTENBERG. Thank you very much, Commissioner Johnson.

Now I would like to call on Mr. Michael Hogan. Michael is the counselor to the Commissioner of Department of Environmental Protection in the State of New Jersey. He is someone with whom we have already done a fair amount of work. We welcome you here, Michael.

STATEMENT OF MICHAEL HOGAN, COUNSELOR TO THE COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL PROTECTION, STATE OF NEW JERSEY, TRENTON, NJ

Mr. HOGAN. Thank you, Mr. Chairman. First let me say we appreciate having this opportunity to address this most serious of matters that affect not only New Jersey, but States throughout the country. We are also appreciative for the various national groups and private interests that have been involved in trying to find solutions to this dilemma.

By way of background, New Jersey has been implementing a comprehensive statewide solid waste management program for the past 18 years. For the past 14 years, dating back to 1979, New Jersey has administered formal rules on a statewide basis for flow control of all non-hazardous solid waste from over 567 municipalities and 21 counties. Through our State and county program, 12 modern lined county-wide landfills, 5 regional incinerators, and 14 major transfer stations have been brought on-line. Collectively, the 31 major facilities represent the primary statewide infrastructure to handle the 7 million tons of solid waste requiring management from our nearly 8 million residents annually.

Each of these facilities was planned, technically reviewed, permitted, and financed under the premise of guaranteed waste flow as provided for in New Jersey statutes and regulations. Collectively, these 31 major facilities represent over \$2 billion in capital investment. It is probably fair to say that New Jersey has one of the most, if not the most comprehensive statewide solid waste program in the Nation.

Waste flow control is inextricably woven within New Jersey's solid waste management program. In terms of protection of human health and the environment, our impact assessments and engineering design review process for all facilities is significantly based upon waste flow. Such fundamental permitting issues as traffic analysis, on-site vehicle flow, mandatory truck routes to and from facilities, system and equipment design capacities, waste generation and composition analysis, and incineration emission limitations are all calculated and reviewed based upon specific service areas and local circumstances defined by our waste flow rules.

In terms of capacity, the 12 county-wide landfills and 5 regional incinerators represent approximately 13,000 tons per day of disposal capacity which accommodates the majority of the State's estimated long-term disposal needs. Each was developed to service the needs of defined service areas. Clearly, the existence of flow control and franchises under New Jersey's utility based solid waste disposal program was critical in the planning, financing, and public acceptance of these projects. Additionally, new capacity is under engineering design review or in planning stages to accommodate the estimated shortfall of 2 million tons of in-State disposal capacity per

year in 1995 when the State is anticipated to achieve its 60 percent total waste stream recycling rate.

Our State goal is to achieve self-sufficiency in the disposal capacity by the end of the decade. We do not want to rely upon our sister States for disposal capacity on a long-term basis. Following peak conditions in 1988, we have annually reduced exports and currently less than 20 percent of our generated waste is disposed of out of State. Waste flow is absolutely critical to enable us to complete the job and take charge of our own disposal situation.

I should also point out that the financial markets which financed the \$2 billion of capital are watching this process very closely. Should waste flow regulation not be permitted in the future, the financial ramifications to the counties and municipalities could be enormous and potentially have an adverse effect throughout the State and local government in other areas.

To specifically address the bill itself, New Jersey has two substantial concerns. The first concern is that post-May 15, 1994 activities, New Jersey and other States will be subjected to unnecessary litigation in the Federal court on the issue of the competitive designation process. Historically, litigation on solid waste matters has been for the most part in the State courts, including our Supreme Court. These courts have tested New Jersey's solid waste program over the last 20 years and found it to be sound. To now provide a new Federal forum which will potentially subject New Jersey and other State's solid waste programs to many of the same fundamental challenges which have been thoroughly litigated by the New Jersey courts seems considerably redundant.

The competitive designation process and the limitation sections on pages 4 and 5 of the draft will be subject to varied interpretation which will cause much uncertainty in the disposition of solid waste and with those bond holders who financed the investment made by the counties whose capital is vital to development of future state-of-the-art facilities. Therefore, after working cooperatively with the other New Jersey counties, the Department has recommended replacement language which we have submitted and is attached to our statement.

Our second area of concern also deals with the effect of interstate commerce provision located on page 13. We have also included for your consideration language that we feel will best protect New Jersey not only retroactively but prospectively. It is very good to protect the States for all their past investment, but for States like New Jersey who have been in this business for nearly 20 years, almost a generation, it is absolutely critical that the States be allowed to deal with this problem prospectively under a waste flow provision.

To conclude, flow control was the foundation of New Jersey's entire solid waste management system. We are not alone. It is our understanding that over half the States now utilize some form of flow control. We strongly support congressional action to authorize States to administer flow control as a legitimate exercise of planning and regulatory authority.

Thank you very much for this opportunity. If you have any questions, I will be more than happy to answer them.

Senator LAUTENBERG. Thank you very much, Mr. Hogan.

We are joined by the Senate Majority Leader, Senator George Mitchell. Senator Mitchell and I have worked together very closely on flow control legislation. And if you would like to, we would be happy to hear from you at this point.

**OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S.
SENATOR FROM THE STATE OF MAINE**

Senator MITCHELL. Mr. Chairman, thank you very much. I wanted to come to convey my thanks to you and my support for the legislation which has been drafted under your leadership, and also to welcome Gary Lorfano here from my home State of Maine. He is a member of the Town Council in Scarborough, Maine, and he is here today to represent the views of the Conference of Mayors on flow control. He is a capable spokesman for local officials regarding this subject. As chairman of the board of directors of Regional Waste Systems, a group of 31 Maine municipalities organized to address solid waste issues, Gary Lorfano was instrumental in bringing this issue to my attention and in giving me a better understanding of it as well as my staff.

I support the goal of giving authority to States and local governments to control the disposal of their solid waste. Mr. Chairman, I have co-sponsored your legislation which I believe is a balanced approach. You have worked very hard to bring all interested parties together to draft a bill that protects local interests while allowing for competition in the industry. I hope the committee will endorse the Lautenberg bill which I think is a fair and reasonable proposal. I thank you and the other Senators for giving me the courtesy of making this statement. I have to return to the floor, but I wanted to come personally to convey these feelings to you, Mr. Chairman.

Senator LAUTENBERG. Thank you very much, Senator Mitchell. And thank you for the support that you have shown for this. We are trying to establish a program that gives balance, that protects the investments already made by communities, those contemplated, some financed not yet built; and to permit the commercial interests to participate, to bid for business. We don't want to shut people out of business. We do want to maintain an orderly flow of trash. But States have been sent into shock. And up and down the coast and across the country, there are very places that don't have a very specific view on this. So thank you very much for joining us.

I would take a moment now to say that we have a statement from Senator Wofford which I would enter into the record now.

[The prepared statement of Senator Wofford follows:]

**STATEMENT OF HON. HARRIS WOFFORD, U.S. SENATOR FROM THE STATE OF
PENNSYLVANIA**

I thank the Chairman for having this hearing on the important issue of flow control. Since the U.S. Supreme Court decision this last May 16 in *C&A Carbone, Inc. v. Town of Clarkstown, New York* I have heard from many local officials in Pennsylvania.

Many counties and local governments have relied on the ability to use flow control in order to manage the disposal of solid waste. The decision in *Carbone* makes all of that planning and hard work moot. Many Pennsylvania counties are in the process of implementing waste disposal plans. For example, Adams County is in the midst of planning a compost facility, which will help reduce the need for landfill capacity. Now, those plans have to be put on hold.

Pennsylvania has made remarkable strides during the past 8 years in waste disposal management. Through aggressive recycling efforts we have reduced waste exports and are extending our own capacity. Like the area of interstate waste transportation, the courts have now ruled that flow control plans are impermissible. Unless Congress acts.

Mr. Chairman, I believe it is time for Congress to act on flow control and I look forward to working with you and the other committee members to enact interstate waste and flow control legislation soon.

Senator LAUTENBERG. I will call next on Mr. Goodstein. Mr. Goodstein, you know about the five minute rule; you have been under that for a long time.

[Laughter.]

STATEMENT OF RICHARD F. GOODSTEIN, DIVISIONAL VICE PRESIDENT, NATIONAL GOVERNMENTAL AFFAIRS, BROWNING-FERRIS INDUSTRIES, INC.

Mr. GOODSTEIN. Thank you, Mr. Chairman. Mr. Chairman, Senator Durenberger, Senator Faircloth, thanks very much for giving BFI an opportunity to testify about a subject that obviously we're quite focused on. Flow control is an issue however that is not just of concern to the waste management industry, some railroads, and State and local governments. The National Association of Manufacturers, the United States Chamber of Commerce, and the Sierra Club have each within the past few weeks written to Congress expressing concern and grave misgivings about flow control.

BFI starts from the premise articulated by Senator Moynihan recently during the debate over the Interstate Waste Bill. Senator Moynihan in that context said, "A bill limiting interstate commerce in any article is not good policy." There can be no question that markets are distorted when there is interference with the free flow of commerce. Indeed, there is an irony that at a time when the United States through NAFTA and GATT is trying to give people throughout the world the benefit of the free flow of commerce that Congress should be considering legislation at home that would truncate commerce. Moreover, at a time when the administration and so many in Congress are rallying behind the notion of reinventing Government, we believe Congress should be quite reluctant to pass legislation that militates against privatization, which this would or some of the bills would, and would confer monopoly power on the public sector notwithstanding a competitive existing vibrant private sector.

There can be no doubt that market forces work in connection with solid waste management. Think about the late 1980s. Remember the garbage barge; we've even heard reference to it this morning. I think a lot of Members of Congress locked in on the issue back then—landfill crisis, skyrocketing tipping fees—but, in fact, the market worked. Since then there has been a lot of new capacity brought on line. In response to State and local mandates for recycling and composting facilities, there has been a proliferation of the development of facilities with the result that there is a lot of new capacity. Just read the Wall Street Journal yesterday wherein they talk about a glut of capacity and dramatically dropping tipping fees. The marketplace works.

If Congress starts from the premise that it should interfere with commerce no more than is necessary, the question is, what is the

problem that the *Carbone* decision created? We would suggest that there is one actual problem that Congress should indeed address, and that actual problem has been referred to, which is all these existing facilities that are at risk if Congress does not act. BFI is quite sympathetic to the plight of taxpayers and local governments who have facilities that were predicated on flow control. The Supreme Court has now said flow control is not enforceable, therefore we do believe Congress should respond. I might point out, however, that Kidder-Peabody and Standard and Poors have both expressed the opinion that in their view existing bonds, even if Congress does not act, are not at risk.

As to each of the other interests identified in advance of the flow control argument, we would suggest that there is a free market response that does the trick, and therefore prospective flow control legislation is not something that Congress should do yet.

Yes, local governments have responsibility for implementing municipal solid waste management programs. But this responsibility for implementing municipal solid waste management programs should not be confused with actually performing the service or indeed even directing where waste has to go. The private sector collects and disposes of most of the trash generated in the country today. Local governments absolutely should retain the police power to assure that waste management practices do not do violence to health, safety, environmental laws. But that police power does not confer authority on them to actually perform the service.

Flow control proponents insist that there will be no public financing of facilities absent flow control. To us, we think the relevant question for Congress is not who will finance the facilities, but whether they will be built. BFI alone, and we're just one company, owns and operates without public financing and without being the beneficiary of flow control in most cases, over 100 recycling and composting facilities, almost all of which have been built since 1988. Again, the market works. And we're just one company. And Senator Durenberger, you raised a concern about rural areas. We have a list in our testimony of where many of those facilities are located and many of them are in extraordinarily rural areas.

For that reason and for the reasons that we have covered in our testimony, we do have some grave misgivings about Senator Heflin's bill. To us, it would confer on local governments the authority to say where all waste generated in their jurisdiction goes. That seems like a monopoly power that is being conferred. Frankly, again, we believe the market works, that consumers and the public are best served by competition.

Mr. Chairman, we do applaud some of the elements of your bill for the reasons that I have identified. We think a grandfathering of existing facilities makes sense, although we would argue that it should be not as expansive because we think the free market should kick in sooner rather than later. We think that commercial solid waste should not be subject to flow control in the future, and indeed we hold that same view with respect to household waste.

In sum, the *Carbone* decision created an existing problem. The problem can be solved by grandfathering, making sure that all these existing facilities' investments are covered. As to these other problems, if the free market somehow doesn't work in the future as

it has in the past, a subsequent Congress can deal with that. Let's wait until we see whether that is the case. Thank you very much.

Senator LAUTENBERG. Thank you very much, Mr. Goodstein.

Now we will call on Mr. Lorfano, please.

STATEMENT OF GARY S. LORFANO, CHAIRMAN, REGIONAL WASTE SYSTEMS, PORTLAND, ME; ON BEHALF OF THE U.S. CONFERENCE OF MAYORS AND THE MUNICIPAL WASTE MANAGEMENT ASSOCIATION

Mr. LORFANO. Thank you, Mr. Chairman. Mr. Chairman and members of the subcommittee, my name is Gary Lorfano and Senator Mitchell gave you a brief background. I am here today testifying on behalf of Regional Waste Systems' 31 member-communities, the U.S. Conference of Mayors, its affiliate the Municipal Waste Management Association, and hundreds of local government entities—cities, counties, and solid waste management authorities—which rely on flow control for the implementation of integrated solid waste management programs throughout the country.

I want to thank the committee for addressing this very crucial issue. I would like to give you a brief history of Regional Waste Systems which I think is similar to many other integrated solid waste systems around the country. We had 31 communities landfilling. The State required us to start closing those landfills. RWS looked at all the alternatives and through a five year planning process, 1980-1985, we held 169 public hearings throughout the State. The waste-to-energy option was selected. Our tip fee reflects the total cost of our system.

Our integrated waste system includes waste-to-energy, recycling, composting, landfilling, and community and school education. Our recycling program is recycling by State guidelines at 38 percent which we think is very good. We have planned for capacity for the next 20 years. But to plan for that capacity for 20 years, the financial institution required us to have flow control. RWS has approximately \$100 million worth of bonds outstanding at the present time; nationally there are billions of dollars out there. Flow control is necessary to keep integrated systems intact.

With this explanation of how the RWS system relies on flow control, I would like to touch on an issue relating to this in general. Some say flow control is not competitive but I believe it levels the playing field. It allows small businessmen with small capital investments to be in the trash hauling business. Also, during the implementation of our system, the competitive process has been followed in all public decision-making alternatives, bids for construction of facilities, and for providing services. I have also seen the waste hauling business thrive and grow during a time that flow control has been in effect. So it is hard for me to say that flow control is bad for business.

I believe some clarification is needed in the legislation to provide tools for flexibility in the future to allow some systems to adjust to meet some current solid waste plans. The legislation needs to be clarified to provide flexibility for our systems and the countless others throughout the country to continue to develop and implement their integrated solid waste management plans.

In conclusion, Mr. Chairman, it is not good use of scarce local resources to continue to spend money litigating flow control issues in the courts. It is extremely important, and we know you share our goal, that legislation under consideration be clear and straightforward to avoid future litigation.

Finally, we are not asking for any Federal money. We are asking for the authority to manage solid waste as we have been obligated to do.

I want to thank Senator Lautenberg and Senator Mitchell for your leadership in introducing S. 2227, and we look forward to working with you and your staff in the future on this legislation.

Thank you very much and I would be happy to answer any questions.

Senator LAUTENBERG. Thank you, Mr. Lorfano, very much.

Mr. Wallgren, we would now like to hear from you.

STATEMENT OF DONALD A. WALLGREN, VICE PRESIDENT AND CHIEF ENVIRONMENTAL OFFICER, WMX TECHNOLOGIES, INC., OAK BROOK, IL

Mr. WALLGREN. Thank you, Mr. Chairman. I am vice president and chief environmental officer for WMX Technologies, Inc. I will begin my comments by explaining why we care about flow control. I will then outline our basic position and why we support your bill.

First, why we care about flow control. The WMX family of companies provides a full range of integrated municipal solid waste management services in 48 States. Through Waste Management, Inc., our solid waste subsidiary, we operate 132 solid waste landfills and serve approximately 800,000 commercial and industrial customers, as well as 12 million residential customers. Our recycling programs provide curbside recycling to over 5 million households in more than 600 communities and 75,000 commercial customers. WMI contracts with nearly 1,800 municipalities to provide these services throughout the United States.

In addition, through our Wheelabrator Technologies, Inc. subsidiary, we operate 14 trash-to-energy plants which generate 700 megawatts of electricity. Wheelabrator and WMI also operate several composting facilities. I mention this not to demonstrate the size here, but to indicate that we are providing all of the solid waste services that have been mentioned already today. These services are our business.

Our ability to conduct our business depends on our ability to compete and win customers. Flow control can prevent us from doing business by arbitrarily creating a monopoly for a designated facility to which all waste or recyclables must be delivered. Everyone else is denied the opportunity to compete for customers within that flow control jurisdiction.

Now for the WMX position. Our position can be summarized as follows: WMX supports protection or grandfathering for existing flow control measures that have been implemented by designating the particular facilities to which waste or recyclables must be delivered. This will protect those who actually relied on flow control prior to the *Carbone* decision.

As a second point in our position, we support grandfathering of these implemented measures for whatever waste stream was flow controlled.

Third, we support requiring the jurisdiction to use a competitive process to select or designate a facility to receive waste or recyclables under a grandfathered measure.

Fourth, we support new flow control only for residential municipal solid waste and only for recyclables that have been placed at the curb; that is, where the title and possession have been given up or relinquished to the jurisdiction or its designee.

A fifth point in our position is we believe that facilities that are designated to receive residential waste or recyclables under new flow control measures should be designated pursuant to a competitive process after finding that flow control is needed to achieve the jurisdiction's MSW management goals.

Now, why do we support S. 2227? We support this bill because it is substantially consistent with the position I just outlined. It is in our view an appropriate compromise that balances the need to protect through grandfathering existing investments and arrangements upon which there has been actual reliance and the need to foster and maintain vigorous and free competition in the provision of waste management services. We are aware of some concerns that some States may have. Fully developed and implemented flow control measures that already include findings of need and a competitive process should not be subjected to prolonged Federal litigation under the requirements of S. 2227. To meet that concern, we would have no objection to a prompt and objective process for certification of the consistency of those measures with the requirements of the bill.

A second concern that has arisen with respect to the direct grant of authority to qualified political subdivisions. We believe that the bill should not grant authority to flow control in a manner that would violate State law. In some States, for example, State law requires more competition and prohibits creation of monopolies in markets for certain goods or services. We would welcome the opportunity to work with you and your staff on both of these matters.

There have been several other suggested solutions, including do nothing. We have addressed those in our previously submitted longer statement, so I will not cover those at this time.

Finally, as evidence that the proposal that I have just outlined does work, all you have to do is look at the roughly 2,000 contract and franchise agreements that we currently have in place with cities and counties across the United States. Efficient, cost-effective, and environmentally sound service is being provided. We should build on that positive experience and be careful not to tear it down. We believe that S. 2227 does that.

That concludes my statement, Mr. Chairman. I will be pleased to answer any questions that you and your fellow Senators may have.

Senator LAUTENBERG. Thank you all very much for your testimony. We have heard agreement and some disagreement. The question is how extensive should flow control legislation be. I would like to get some indication of how urgent it seems to those of you who we'll ask to respond to get this legislation in place and get moving on it. So I ask those of you who have had contact with the

community, either through elected office, appointed office, or otherwise but who are working on a routine regular basis with the communities in your State. Each of you did mention the number of facilities under consideration, those that are already in place. How about lawsuits? We will start with you, Commissioner Johnson. Have there been any filed in your jurisdictions seeking to overturn flow control laws because of the *Carbone* decision?

Mr. JOHNSON. Mr. Chairman, about 2 months ago our county board was served with a law suit and a demand for \$139 million in payments in a suit filed by some haulers—and this was even before the *Carbone* decision—the claim being that we had no authority to impose flow control over the previous 4 years, that higher tip fees were paid, and that the haulers should be reimbursed for the difference between the tip fee that they were paying for our designated facilities and what they would have paid to have taken it to older landfills in other States.

It is a very substantial lawsuit; \$139 million is a lot of money for a jurisdiction like ours. We have taken that case very seriously. It is going to be very expensive to defend.

Senator LAUTENBERG. Mr. Hogan, what have we seen in New Jersey besides the ones filed yesterday?

Mr. HOGAN. Yes, we'll start with that one. But there has been a great deal of litigation involving New Jersey. Putting yesterday's major thrust aside for a moment, the principal litigation involves Atlantic County in a case of Atlantic Coast v. Atlantic County which has now worked its way up to the third circuit. That case was initiated actually before *Carbone* was decided. The district court judge found in favor of the waste flow process. It went up to the third circuit and then there it was stayed until *Carbone* came down. Now that *Carbone* came down, it has been reactivated. In addition to that, one other local town in South Jersey also filed a law suit and that, too, is now at the third circuit under briefing schedule and we should hopefully have a decision on that in the not too distant future. We have yesterday's law suits that again present a major challenge. And I believe there are two or three other law suits that were filed up in North Jersey that we're seeking to have transferred down to the third circuit.

Senator LAUTENBERG. Just for the information of my colleague here and those who are hearing this testimony, the suit that was filed, or at least announced yesterday, was on behalf of a couple of communities and some haulers to dissolve any waste flow control programs and permit the municipalities to make their own decisions. Obviously, that is the heart of the matter and it does lend a certain degree of urgency to getting these matters considered. We heard it from our colleague from North Carolina, we heard it from Mr. Johnson from Minnesota. Mr. Lorfano, how about lawsuits up in Maine, or do you just resolve everything sitting down and chatting a little bit?

Mr. LORFANO. I wish that were the case, sir. But we have two lawsuits in the State at the present time. They are requesting the difference in disposal fees. But the other thing they would like is they want the court cost and attorneys fees and those will probably go to trial in the fall and that could get very expensive for a small municipality that we have in Maine.

Senator LAUTENBERG. I want to ask each of you another question, and that is, what effect do these suits have on your solid waste programs? Do they lend some impetus to changing them, getting this kind of legislation put in place? What do you see happening as a result of that?

Mr. HOGAN. Mr. Chairman, in New Jersey it is having, I think, a severe detrimental effect because it has a tendency of pitting counties against counties and municipalities against counties. The counties that live close to the river want to take their trash over to Pennsylvania for cheaper rates. They are fighting with counties who have facilities to take care of their local solid waste. In addition, there is the uncertainty of towns and counties in terms of setting their budgets, plus the financial markets. There was a comment made earlier about the financial markets not being that concerned. I can tell you I have had personal conversations with members of the various financial houses and they are watching this very carefully. In New Jersey, if not in most cases, if these bonds can't get paid off, the local taxpayers have guaranteed them and in at least one major facility there is no guarantee at all. So it is a very serious problem.

Senator LAUTENBERG. What do you see, Mr. Lorfano?

Mr. LORFANO. Senator, it is the uncertainty. We have inter-local agreements. Not only is flow control assuring our bonds, 21 member municipalities have pledged their full faith and credit of their municipalities to pay the bonds. So the uncertainty with flow control makes those municipalities very nervous because we're obligated to pay those. If we are not paying them with tipping fees, they are going to be paid with real estate taxes. So there are a lot of towns with a lot of uncertainty there. And it also may affect the bond ratings of some of these municipalities and especially some of our larger ones, the City of Portland, the City of South Portland, because——

Senator LAUTENBERG. Are these new financings?

Mr. LORFANO. No, sir. These are existing.

Senator LAUTENBERG. Has there been any change in the rating on these bonds?

Mr. LORFANO. Not at this time I don't believe, but they certainly have looked at it. I can tell you that there have been discussions and they are looking at that bond rating. The City of South Portland, like I said, and the City of Portland, which is a major backer of the system, they really look at their bond rating and that uncertainty is very real, sir.

Senator LAUTENBERG. Mr. Johnson, does this affect your solid waste plans?

Mr. JOHNSON. Mr. Chairman, there are effects on two sets of local governments. Local governments like my county that are quite far along in building an integrated waste management system where we have tried to take the total cost of waste management and have it paid for by waste management fees that are ultimately paid by all waste generators, we're beginning to dismantle that system now because we simply cannot levy property taxes to pay for the recycling programs, collection subsidies, the household hazardous waste separation and disposal programs, the source re-

duction programs, consumer education programs. And we're beginning to dismantle that right now.

But also for the jurisdictions that are not as far along in building these environmentally more protective facilities, we are thwarting their planning process because if they can't be assured of having flow control authority, they are being stopped in their tracks. They are scared off by the threat of lawsuits, they are concerned about going forward and trying to issue bonds in an uncertain market, and the progress that we were making throughout this country with local governments coming to grips with dealing with our solid waste—an unfunded mandate in many ways and one which local governments did not complain a whole lot about because we recognized it as a traditional local government responsibility—it is getting harder and harder to handle. If you want us to handle these problems, and we're willing to do so, please make sure that we have the tools that we have always depended upon or thought we could depend upon to do so.

Senator LAUTENBERG. I would ask, and Mr. Lorfano commented on this, have either of the two of you seen any changes in bond ratings since this decision was handed down?

Mr. HOGAN. I don't believe there has been any specific changes in New Jersey as yet. I think the jury is out on this. I think people are waiting to see what Congress is going to do and what the courts are going to do.

Senator LAUTENBERG. Have you seen anything so far by way of change in the ratings on bonds?

Mr. JOHNSON. Mr. Chairman, we have not issued any bonds since the decision came out, but I know that we would be questioned very, very closely about it at that time.

Senator LAUTENBERG. But discussions might have been underway before that now perhaps have different terms.

Mr. JOHNSON. Mr. Chairman, very definitely.

Senator LAUTENBERG. How about any partially completed facilities that any of you have.

Mr. HOGAN. We have one facility in New Jersey in Mercer County which is a major incinerator facility which was being counted on to help New Jersey meet its self-sufficiency goals. It is at a critical stage. It can't go out to bonding until it has its contract signed. It now technically has its permits substantially from the Department. But they are in a quandary and I think they are pulling their hair out.

Senator LAUTENBERG. Is there temporary financing?

Mr. HOGAN. I don't believe so. I don't know for sure. I think we're talking about their actual bonds that will be sold.

Senator LAUTENBERG. I am going to recognize Senator Durenberger for his questions. But one more point; I am told that there have been downward adjustments in Pennsylvania that resulted from this. It is very shaky. Who would want to take the risk out there? Any of you want to buy bonds for a facility that may not have a revenue stream to cover either the interest or the amortization of the bond? I hardly think so.

Mr. JOHNSON. Mr. Chairman, in Minnesota we had two projects that are now on hold if they are ever to be built. One is a consortium of ten southwestern more rural Minnesota counties that had

planned on going together with a compost plant to upgrade their waste management practices. That is on hold now until the situation can be—

Senator LAUTENBERG. How many families might that involve?

Mr. JOHNSON. That would probably be about 250,000 people. I am just guessing at that, but it is a large rural area. We also have one county in our metropolitan area that was looking at a modern waste-to-energy plant and decided—

Senator LAUTENBERG. What's the cost of these facilities?

Mr. JOHNSON. A waste-to-energy plant, it depends of course on the size, but the size that they were looking at would be in the range of \$80 million. A compost plant would be considerably less expensive and much smaller capacity.

Senator LAUTENBERG. Quite an obligation.

Mr. LORFANO. Mr. Chairman, may I just make one point. You asked about the decision in Clarkstown, the effect it has had. We have seen that it hasn't made much of a difference right now. I think most of the haulers are respecting it and are waiting and looking to the Congress to see what they are going to do. But if Congress adjourns without legislation, I think the consequences could be devastating to our system.

Senator DURENBERGER. You heard the Chairman say we're not going to do that.

Mr. LORFANO. Yes I did, sir.

Senator LAUTENBERG. Are you saying we're going to stay in until we resolve it.

[Laughter.]

Senator DURENBERGER. That and health care reform, right?

I appreciate this opportunity to get everyone's testimony. It has really been helpful to me.

When I read a definition here of flow control, it says it is laws that allow State and local governments to designate where solid waste generated within their jurisdiction must be taken for processing treatment or disposal. Is that a generally accepted definition of what we're talking about? Solid waste seems to have, especially every time we get at RCRA, it seems to have a constantly broadening definition. It is waste from residential sources, commercial, institutional, industrial, includes incinerator ash, construction debris, demolition debris, recyclable materials where ownership is voluntarily relinquished, recyclable materials where ownership is involuntarily relinquished. I imagine there are probably a lot of other definitions within this description of solid waste, is there not Commissioner Johnson? Or have I pretty well covered it?

Mr. JOHNSON. Senator Durenberger, that's quite comprehensive. But this is a rapidly changing field lately. As I mentioned, what used to be garbage yesterday seems to be gold that people are fighting over today.

Senator DURENBERGER. That's what I am trying to work my way up to here. The other thing is that we have 30-some States in the country that specifically authorize local jurisdictions within certain parameters and exercise flow control. Like Minnesota, it is a State authorization by which local government exercises its authority, is that not correct?

Mr. JOHNSON. Senator Durenberger, every State seems to do this slightly differently but the general pattern is a State will pass a State law that authorizes cities and counties or some combination of local governments as a solid waste authority to enact waste flow control. And there are various processes or procedures that a local government has to go through before enacting flow control. For example, Minnesota, like a number of other States, requires a hearing process. People who want to take their own recyclable material and send it on its way, separate it from their own waste stream, have the right to do so. People who reduce volume of materials by more than 85 percent, the residue is not considered solid waste subject to designation. We are required to go through a competitive bid process. Our friends from BFI were a very active part of that competitive bid process for our waste-to-energy plant. They were not successful and I did not hear any complaints back then until the bidding was over that there was anything wrong with waste flow control.

[Laughter.]

Senator DURENBERGER. I guess what I am trying to work my way toward here is listening to this discussion I am getting the feeling this is like some point in the history of the Postal Service, that in the middle of the table and to my right I am looking at the Postal Service and over there I am looking at UPS and Fed Ex or something like that. It is one of those situations in which a public monopoly, if you will, or even a public decision-making process, if it decides it is going to own all of these facilities and operate all these facilities, it doesn't give to the constituents the benefit of private delivery of certain kinds of services.

And yet I also get the impression, and maybe I will ask this of Mr. Wallgren and Mr. Goodstein, that in the whole panoply of solid waste materials there is a degree of profitability, if you will, or a degree of market. As Randy said, the definition of gold keeps varying here. Some of this stuff is more attractive than others. For some there is no market unless you can make the disposing of the product such an imperative that people will pay any price to get rid of it. Is that not the case in solid waste?

Mr. GOODSTEIN. As I mentioned, Senator, BFI has just since 1988 built largely without the benefit of flow control and with private financing over 80 recycling facilities, materials recovery facilities. We are making money at it. The notion that recycling has to be subsidized and therefore you need flow control so that you can somehow mask to the consumer in some fashion what the consumer is truly paying—disposal plus something on top of that to subsidize recycling—is simply a view that we don't subscribe to because it contravenes our view of the world. Recycling is the single fastest growing part of our business. It is profitable. I only wish that the notion was not so ingrained as it appears to be that somehow recycling is a loss leader and that you need these other devices to prop it up. That is not our experience. I wish others were experienced in the same way we were and I think others would then have the confidence in the free market that we do.

Senator DURENBERGER. What materials aren't recyclable?

Mr. GOODSTEIN. We're recycling anything that a State or local government insists be recyclable. Indeed, that's why we think the

free market works. When a State or local government has a mandate that certain materials be diverted away from landfills or incinerators, that is what creates the market. And when those materials can't go to landfills or incinerators, the BFIs and Waste Managements and Laidlaws and others are coming along and providing a service. So I guess I would probably not subscribe to the Postal Service/UPS/Fed Ex argument because the fact is we have been providing waste management services to the public in this regard forever. This is not something where we're trying to move anybody aside. We have been there. We are just afraid frankly of being moved out.

Mr. WALLGREN. To support that, first off we have over 130 material recovery facilities that we operate within our company and we have done that without the benefit of flow control in most of those instances. But they involve in many cases some kind of a partnership effort with a local community or county. The issue there in order to promote recycling is not flow control. What really is needed is to have the ability there to work with the cities and counties but to do it on a competitive basis and then to have markets, create markets for those materials. And to refer back to the gold comment here, I think the free market will decide where the gold is. All of these services are being provided right now. So it doesn't require unilateral action on the part of a municipality.

Senator DURENBERGER. But flow control doesn't imply that the ultimate disposition is always going to be made by some publicly designed and funded energy plant or incinerator plant or anything like that. In fact, I would guess for most of the flow control designations there is some kind of a private-public partnership of some kind; are they not?

Mr. GOODSTEIN. Senator, if I could, and that's a fair point. We're happy to compete against—

Senator DURENBERGER. Well, is that real or not? How much of your business is the result of a flow control negotiated enterprise of some kind?

Mr. GOODSTEIN. Commissioner Johnson made the point that BFI didn't object when we bid on the flow control regime. The fact is when we go into a ball game we will work under the rules that are in force. The fact is in Hennepin County that was a flow control regime and we were going to do our best to win that business. We think that the consumer is disserved because of the lack of competition. And you're right, the Heflin bill that you have cosponsored does not say that the public sector should be the only ones. But ask yourself, for what other private sector has Congress passed legislation to say that the public sector would have unfettered authority if it so chose to basically always look to itself, the public sector, to do business with and which would leave the private sector powerless to do anything. That is probably something that Congress does not do lightly. I suspect it hasn't done anything in memory that comes close to that conferrance of power.

Senator DURENBERGER. We do it with Medicare and Medicaid all of the time. We make the decision that people can contract with private doctors and hospitals and so forth or you can a build public hospital or something like that. It is not an unusual situation for a Government agency to make a decision that in order to supply a

need a private producer of services is more appropriate, more efficient, whatever the case is.

Mr. GOODSTEIN. The analogy in the health context would be saying that all patients, if the local Government said, have to go to Government-owned hospitals; that they would have to, they would not even have the choice to go elsewhere. That is what this feels like to us. I don't think that is what Congress has done in those connections.

Senator DURENBERGER. But isn't one of the differences between what we will call the Heflin approach and the Lautenberg-Mitchell approach that there are not adequate process safeguards built into the Heflin approach to make sure that the public interest in those communities is being properly served by an analysis such as Hennepin County apparently went through, an analysis of the cost-benefit to everybody in the community of a private incinerator, private whatever other disposal. Isn't it the process part of their bill that is different, at least one of the things, from the Heflin bill? There is some guarantee that in the public process private interest is going to have an opportunity for competitive bid and so forth in that process.

Mr. WALLGREN. I believe in S. 2227 there is the opportunity for this public process, for the public to conduct this process to determine what the means for managing waste should be and whether that should be a trash-to-energy plant or landfill or recycling or some combination of them. As long as there is that public process, and we believe that opportunity exists there, and then it is competitively bid, we can certainly agree with that. That is not inconsistent with the framework within which we operate in many places successfully now and in which we provide good, sound solid waste management practices. I mentioned all these cities and counties that we have contracts with and in many cases that is the process they have gone through. We believe this bill would provide for that. It is when it gets more restrictive than that that we have a problem.

Senator DURENBERGER. Isn't one of the other distinctions the residential versus the business and industrial? In other words, in the Heflin bill we're covering both and in the Lautenberg-Mitchell bill you wouldn't be required to take the residential, or I guess I need to state that in the reverse.

Mr. GOODSTEIN. That's true, Senator. I have stated on behalf of BFI why we think the free market ultimately delivers the economies and the efficiencies whether the waste is commercial or residential. But it is certainly the case that Senator Lautenberg's bill to us is a step in the right direction, very much so from the standpoint of allowing the drug store and the shopping center to be able to do tomorrow or after this bill passes what it has done for decades, which is to negotiate the best possible price for whoever is going to haul away their dumpster. We don't understand what has changed to continue that process.

Mr. JOHNSON. Mr. Chairman.

Senator LAUTENBERG. Please go ahead, Mr. Johnson.

Mr. JOHNSON. Mr. Chairman, Senator Durenberger, there have been a couple of analogies to the Postal Service versus Federal Express. As I am listening to this discussion I think it really reminds

me a lot more of what Congress has gone through recently with the cable companies. We are listening to two very aggressive, large, influential, well-funded companies telling us that they don't want any further regulation and it will be in everybody's best interest. I think that the people in Congress have heard that argument from the cable companies. I think that is the analogy. Or maybe there is another one when we look at the local governments and the private companies. I say this as a confirmed practicing capitalist. The local governments are here to look out for the public interest, for the public health, for the environment over a long period of time. We will be here 20 and 30 and 50 years from now. Our interests aren't just the bottom line next quarter or the end of the year or a five year profit projection. These waste management costs occur over a long period of time. And we are on the side of protecting the environment and protecting the public health.

Second point. I was quite astounded to hear from our friends at BFI that recycling need not be subsidized any longer. We spent \$8 million last year to subsidize recycling and a fair amount of that went to BFI. The first thing I am going to do when this hearing is over is put a stop payment on last month's check.

[Laughter.]

Senator LAUTENBERG. They are not under oath here.

[Laughter.]

Mr. JOHNSON. Recycling is expensive and recycling didn't come out of the good will and the good nature and the good hearts of the private hauling companies. These people are in business to make a profit and, by gosh, there is nothing wrong with that at all. That is the system and I believe in it strongly. But it is very interesting that they didn't start picking up recycling curbside in our community until they were required by law to do it and got paid to do it besides. It wasn't done voluntarily. These are not charitable organizations we're dealing with here. They have a different role in our society. It is an important role just like local governments have an important role.

In this particular situation dealing with this particular clause in the United States Constitution, this isn't where the Supreme Court says this is the law of the land under the First Amendment and Congress shall make no law, this is a dormant clause of the interstate commerce clause where the Supreme Court has said we don't think Congress has spoken clearly enough yet. Now is your chance to do so.

Mr. WALLGREN. I would like to respond to the comment about the concern over the environment. I would like to point out that not too many months ago we went through the debate about the implementation or the effective date of subtitle D requirements for municipal waste landfills. At that time, it was not our company or our large private competitors that asked for an extension to not put those requirements in place. It was municipalities and counties that wanted an extension to not go to the more rigid requirements. The private sector, particularly speaking for ourselves and some of our worthy competitors, was prepared to meet that requirement and prepared to protect the environment. I think we are doing a very good job of that. So I think we do protect the environment.

Senator LAUTENBERG. Thank you. We will try to confine this discussion to the narrower subject at the moment. Mr. Wallgren, Mr. Goodstein, in the case of New Jersey, we're concerned that it already requires a competitive process like the one in S. 2227 and the process in that bill might lead to some unnecessary litigation. If a State already employs a process that is substantially equivalent to the one in our bill, is there any need to require State and local governments to comply with yet another process? Your view?

Mr. GOODSTEIN. Senator, so long as the competitive process or the substantial equivalent of it that was put forward in your bill is met, we don't quarrel. Again, we are concerned about a blank check piece of legislation that could lock in competitive processes that may or may not meet that same standard. But so long as there is some substantial equivalency, we are looking for no more than that.

Senator LAUTENBERG. Do you have a comment on that?

Mr. WALLGREN. We would feel essentially the same way. As long as there is a competitive process in place and it is essentially the equivalent of what is proposed in the bill, we would certainly support an equivalency or a certification that it is the equivalent process and nothing further would be required.

Senator LAUTENBERG. So then each of you certainly would be willing to work with State and local officials to ensure that these governments have only one competitive process to comply with. Mr. Hogan, for the purpose of our review today, I want to make sure of that because there are concerns in New Jersey, if you would like to do that.

Mr. HOGAN. Surely.

Senator LAUTENBERG. Then Mr. Goodstein, why doesn't the competitive designation process in S. 2227 resolve your concern about the respective flow control interfering with the market place?

Mr. GOODSTEIN. With respect to commercial waste, as I have said, we obviously think that the interests of free markets are being served. With respect to household waste—and I might just say that we look at residential waste as a bit too broad. Apartments, hospitals, and so forth are typically within what we think of as the commercial waste universe. I don't think anybody disagrees with that. We would think of household waste rather than residential. But again, we tend to think that something that more immediately gives the benefit of free markets to consumers and households and does not lock them in to flow control arrangements that might have a 20 year life to feed a certain facility, we're a little bit concerned that that might stymie competition down the road. But having said all of that, I think your bill certainly goes a long way in the interest of competition.

Senator LAUTENBERG. And to each of you just generally, doesn't the strong trend in State and local governments toward privatization of functions indicate a willingness to make greater use of the private sector for these kinds of services?

Mr. HOGAN. Senator, New Jersey has a long tradition of privatizing and that is continuing and is a thrust of our present governor. In the solid waste area, probably the majority of the major facilities in New Jersey have a private component to them, a major substantial private component to them. They either own the facility or

the municipality owns it or the county owns the facility and the private entity runs the facility, all done on a competitive basis. So there is a great commitment to privatization but there is also a commitment, as my colleague from Minnesota says, that the government has a role to play to guarantee the safety and the health and that there will always be facilities available for solid waste disposal.

Senator LAUTENBERG. And very often it takes government to lead the way to provide the service before there is a marketplace that is developed. But I think it is fair to say that once having had the experience of running not only these kinds of facilities but other things as well, to turn to the private sector if it can do the work that is required, and I don't see any change in that direction. What we want to do, and to Senator Durenberger's concern, is to try to preserve the competitive aspect and not exclude the commercial sector at all, the private sector. But we want also to make sure that commitments made on behalf of the citizens of an area are upheld. The court gave us the opportunity to once and for all statutorily make that the case. This is not only the correct time, but it is also obviously the correct place.

But we have got to get on with this because there is such risk. Property taxes—forget about the rescue of political seats, that has little to do with it—some of these communities could be bankrupted by the kind of burden that they would have if there was a facility that they were contracted for that wasn't getting used. So while in a single community it may look appealing at the moment to turn away from a waste flow management system, in the final analysis you will pay for it anyway. You pay for it twice. You pay perhaps currently a more modest rate but eventually you pay the full price for the facility that you have constructed and contracted for.

David, I have nothing else.

Senator DURENBERGER. I need to finish off the line that I was trying to get on to. Let me ask Mr. Hogan and Mr. Lorfano a question. If we took from the bill that Mr. Lorfano said the Conference of Mayors support, S. 2227, if we took out of that some of this process for analyzing all the pros and cons and all that sort of thing to make sure you fairly protected the public interest, if we put that into the Heflin bill S. 1634, could you support the Heflin bill? It seems to me that leaves one major distinction. The Chairman and the Majority Leader's bill allows flow control or authority for residential waste but not for commercial, industrial, institutional, and so forth. Something strikes me as being a little unfair about that.

Somebody help me understand how big is the gap between these two bills and why we can't close it. Mr. Hogan, you are from New Jersey, out of respect for the Chairman, help me understand. What is the difference between you and Commissioner Johnson's position?

Mr. HOGAN. I honestly can't address those specific differences between he and I. Only to say the fact that we're attempting to grandfather in the residential, commercial waste and so forth. In a State that has a program, in our opinion it doesn't go far enough unless it also allows that State to continue to operate in the future. It causes you to have—

Senator DURENBERGER. With that you agree with Mr. Johnson.

Mr. HOGAN. I think so. Absolutely. Otherwise a State like New Jersey would effectively have two systems. It would have system A and system B.

Senator DURENBERGER. Post-May 15, 1990—whatever it was—and pre-. Why?

Mr. HOGAN. That would be completely unworkable.

Senator DURENBERGER. Mr. Lorfano?

Mr. LORFANO. To be honest with you I am not that familiar with the Heflin bill. I believe it allows a future control of commercial waste. We would like the committee to be able to go as far as they can go. The primary objective is to ensure our existing facilities, but we certainly would like the committee to go as far as they can go and get a bill this year.

Senator DURENBERGER. For sure we have got to do the grandfath-ering. But if we can get some direction for the future that makes some sense.

Mr. HOGAN. We have to have it.

Mr. LORFANO. I think that debate has to happen, sir, but whether it happens now or in the future, that's not for me to decide. But, yes, I think that has to happen.

Senator DURENBERGER. Mr. Johnson?

Mr. JOHNSON. This is not an issue that has arisen just since the Supreme Court case a couple of months ago. Negotiations have been going on for at least the last 2 to 3 years on these very issues. I feel that from the local government perspective we have been very amenable to trying to work with the private sector and the interests that they perceive long before the Supreme Court made its decision. One of the things I think that we do agree on is the importance of making sure that when local governments implement flow control that it is being done to facilities that have been selected pursuant to an open public competitive process, either the one similar to what is in S. 2227 or something substantially equivalent that I think most States already require.

But the key is are we going to develop throughout this country based on congressional action of a bifurcated system where if you live on one side of the street your waste has to go to a certain kind of plant at a certain fee, but if on the other side not; if it is an apartment building, now it is suddenly commercial, but if it is a four unit building it is called residential; and it is all right to have monopoly control—I don't understand why it is okay to have monopoly control of residential waste and that is okay for local governments to do that, but when we get to the commercial sector, however that is defined, then that's not something that local governments should be able to have flow control authority over. Garbage is garbage.

Senator LAUTENBERG. Garbage isn't necessarily handled in the same place now. We differentiate between those materials that are toxic and those that are conventional household waste, the whole question of recyclables is hardly yet completed. Mr. Johnson, I wrote a piece of legislation called the Pollution Prevention Act and we deal primarily with toxic. I hope one day that we will be able to expand beyond that. We have got to reduce the flow. But that doesn't mean that businesses can't look at this. In the long-term

future, I don't see us reducing the flow. The demands grow ever larger and we might reduce the amount of output per person or per family but we still are seeing an enlarging society and a whole different range of packaging. So we have a long way to go.

But I can see where you might differentiate because perhaps a commercial hauler is willing to go into facilities where they can negotiate with the individual about how they package their material, what kind of a container. Try doing that in an apartment house and be specific about where the cans go, where the bottles go, and so forth. It is very difficult and it can require two different systems.

What we want to do is try to preserve the present structure if there is one in existence. I come from the private sector and I thought I might be able to bring that to Government. The Government may convince me that I can't do it but it would be a terrible thing to have happen. So we're trying to make this reasonably flexible. We can't offer every opportunity but we want to get on with something.

I think the differences, Senator Durenberger, between what Senator Heflin and you are offering and what we are offering can be narrowed and I hope so because we want to turn out something here that is going to work for the country and allow these communities to be able to breath easier and at the same time not preclude the opportunity for the private sector to make a good business out of what is something that is very helpful.

Senator DURENBERGER. I notice we have a vote on, Mr. Chairman, but I think one thing I have learned from this hearing, in addition to other things, is that one of the valuable parts of your bill is this process part that makes sure that there has been a public process in which the cost and the benefit and so forth have been measured. I just argue that should apply equally to commercial and business waste as it would apply to residential waste. Recyclables I think we've agreed are out of that, they are not part of the flow control part of the process. But hopefully we can work something out and get this thing moving.

Senator LAUTENBERG. Thank all of you for being here. Thank each of you, you've done a good job.

And with that, we adjourn this hearing.

[Whereupon, at 3:45 p.m., the committee adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and bill, S. 2227, follow:]

STATEMENT OF HON. RANDY JOHNSON, COMMISSIONER, HENNEPIN COUNTY,
MINNESOTA

Mr. Chairman, Senator Durenberger, members of the subcommittee, my name is Randy Johnson and like you I am an elected official—a county commissioner—from Hennepin County, MN. I am also here today representing the National Association of Counties, the National League of Cities and the Solid Waste Association of North America.

Thank you for this opportunity to address the issue of solid waste flow control from the perspective of local officials. In most States, it is government officials at the local level who traditionally have been and often by law now are responsible for disposing of our garbage safely and economically.

As our population grew denser; as more complex and potentially hazardous materials were developed, distributed, and eventually discarded; and as we learned more about the danger to public health and the environment from groundwater pollution

and emissions, the responsibilities of local government for solid waste management continued to increase.

Until very recently, almost everyone assumed that along with local governments' responsibility to decide how best to dispose of our solid waste came the authority to control the flow of waste generated within our local jurisdictions. As you know, the recent US Supreme Court decision in *Carbone v. Town of Clarkstown* and some other lower court decisions—a number of them originating in my home State of Minnesota—suddenly changed that. When garbage was put on barges and trains just a few years ago, nobody wanted it. Today it is a “commodity” and platoons of lawyers argue over who has the right to it.

Flow control is a very important environmental issue for local governments. That is why strong flow control legislation is supported by all of the national organizations representing local governments.

In the next few minutes I would like to explain how we have used flow control in Hennepin County to build what is considered to be one of the most successful integrated waste management systems in the nation, and why you should reject the claims of those trying to stop Congressional action that will clarify that local governments have authority to control the solid waste generated within their own borders.

Last year in Hennepin County, a county of 1.1 million people, we recycled and composted 48.5 percent of our solid waste that for decades had been buried in landfills. Last year less than 2 percent of Hennepin County's solid waste was unprocessed and sent to landfills. Most of the remainder was processed in waste-to-energy plants that produce electricity.

We think that no other metropolitan area has implemented a solid waste program that is more comprehensive and progressive than ours. We have tried to follow the EPA's environmental solid waste hierarchy that generally starts with reduce and moves on down to re-use, recycle, compost, waste-to-energy, and finally, landfill. Hennepin County and the 47 cities in our county keep winning awards from just about everyone who hands out awards for solid waste programs.

What accounts for our success in handling our solid waste in Hennepin County the way almost every serious environmentalist says it should be handled?

Why were we able to recycle and compost nearly 50 percent of our solid waste when other communities struggle to reach even 20 percent?

In Hennepin County, the reason was simple. It was the law. Or, at least it was the law until the court decisions of the past few months.

Hennepin County's flow control ordinance assured that virtually all solid waste from both commercial and residential generators went to a waste processing . . . in our case, a waste-to-energy . . . facility. In other States MRF's or transfer stations are used. Hennepin County imposed a per ton surcharge on the amount every hauler paid to dump (or tip) each ton of garbage at our designated Hennepin facilities. That surcharge paid most of the cost of curbside collection of recyclables from virtually every single family residence every week. It paid for one of the most advanced household hazardous waste collection programs in the nation, taking toxics out of the waste stream.

Because that surcharge was directly related to the weight of waste generated, and because nearly all of our haulers charge waste generators on a volume or weight basis, it meant that generators generally paid for recycling and composting in approximate proportion to the amount of non-recyclable and non-compostable solid waste they generated.

Our successful Hennepin County solid waste management system has depended on our legal authority to designate where the solid waste generated in our county should go. That authority also allowed us to sell the bonds to build the privately operated state-of-the-art waste-to-energy plants for waste that cannot be feasibly recycled or composted.

Let me give you some examples of how flow control is used in other States to protect health and safety. In Adams County, PA, there are no active landfills, only closed sites, one of which is a Superfund site which accepted large quantities of waste over which the county had no control. Household waste must be transported an average of 50 miles or more to be disposed of properly. This is not inexpensive, and as a result, there is a great deal of illegal dumping on farms and roadsides in the rural areas. Flow control allows Adams County to implement a waste-tracking system whereby garbage is manifested as it is picked up by private haulers and disposed of. Manifesting and bringing waste to a designated site encourages haulers to establish consistent and well-defined routes that serve all of the county residents, not just the profitable areas. The county is able to review the manifest forms and determine who is picking up the garbage in each service area, at each address, and

where the garbage is going. This entire process, which is based on the ability of the county to control the movement of the garbage, creates the basis for tracking the waste that might otherwise be illegally dumped. Without flow control, the haulers can disregard the community's health and safety.

In Ohio, solid waste management districts use flow control to negotiate a cap on the tipping fees that private landfills charge to assure that citizens are not gouged and will continue to use the landfills, instead of the roadside ditches. They also negotiate with private landfills to provide adequate long-term disposal capacity for the counties' waste for 10-20 years. This capacity assurance is mandated by Ohio State law. It also provides a mechanism to assure that all the haulers and landfills provide recycling services, not just those that have contracts with local government. In this way everyone is treated fairly and the "little guy" is not a disadvantage to the national or regional waste industry giants.

Under Ohio State law, all of the solid waste districts' existing designations expired on June 27, 1994. Because of the Carbone case, and the threat of litigation from the waste industry, many of these districts did not re-designate, or eliminated the designations they made earlier. For the most part, Ohio counties are waiting to see what Congress will do before they reinstate their State law. These counties will be unfairly punished by a bill that only allows existing designations to be grandfathered.

Now we hear from some in the waste industry that solid waste systems implemented by local governments using flow control are "monopolistic," "anti-competitive," and downright un-American.

Not true. The myth propagated by the haulers is that waste disposal costs will decrease without flow control. The reality is that disposal costs remain exactly the same but the haulers—whose wallets will thicken—will leave the taxpayers to pay for the rest of the system (i.e., recycling programs, household hazardous waste programs, composting projects, public education, etc.)

Solid waste flow control is an issue of waste disposal, not economic protectionism. It is a tool that enables local governments to encourage robust competition and efficiency among existing haulers and enable new haulers (who could not afford to build or buy their own landfills or processing plants) to enter the business.

Solid waste flow control is an issue of public health and environmental protection. It allows communities to make reasoned and deliberate decisions about waste management practices that are best suited to a particular area and population. It also provide a source of funding for consumer education, source reduction, recycling, composting, and household hazardous waste disposal and other waste management programs.

Solid waste flow control is an issue of fairness to the local governments who have issued over \$18 billion in bonds to build environmentally improved facilities, and it is an important planning tool for the many other local governments that would move forward to upgrade their waste management practices and ensure future waste management capacity if they could be assured that they had authority to direct the waste generated within their own borders.

Financing facilities is integral to, but not the primary purpose of, flow control. The need to finance facilities arises solely from the need to manage waste in an environmentally sound manner and to avoid the environmental and financial burdens that will be imposed in the future by less sound practices.

In Minnesota, mandated flow control is the tool of last resort. Its availability leverages voluntary flow control and negotiated contracts for delivery of waste. These are the preferred methods. However, in some cases, achieving either is impossible without the authority to mandate flow control.

Lack of some method of flow control results in waste moving to less environmentally sound facilities because they are almost always cheaper. Flow control is much less disruptive to the marketplace than removing waste collection services from the private sector in order to remove the market incentive to deliver waste to less environmentally sound facilities.

Mr. Chairman and members of the subcommittee, it is interesting to note that this committee adopted an amendment that Senator Durenberger offered granting local governments flow control authority to the RCRA reauthorization bill in 1992. Unfortunately, RCRA was not reauthorized that year and it was not clarified that local governments could exercise waste flow control authority.

Two bills seeking to solve the concerns surrounding the issue of waste flow control have been introduced in the Senate. Those two bills are S. 1634, the "Municipal Solid Waste Act of 1993," and S. 2227, the "Flow Control Act of 1994".

The most basic form of a Federal flow control statute would be a grant of immunity for State or local governments from challenge under the commerce clause of the

Constitution. Such "grandfather" language would leave existing State and local laws, which establish a variety of requirements and mechanisms for establishing flow control, in place.

It is easy for me as an elected official from Minnesota to state that since we have spent 15 years building our comprehensive solid waste system, we would be happy to have this basic form of blessing from Congress. Both S. 1634 and S. 2227 establish conditions which States, local governments, and waste management facilities must meet in order to qualify for immunity. It is argued that such language may allow continuing legal challenges to existing flow control arrangements, which may not meet the conditions that are established under the new guidelines.

I understand that representatives from the State of New Jersey are negotiating certain changes in S. 2227. Those changes, if accepted, will remedy the primary issues raised by the various local governmental units. NACo, as well as the broad coalition of organizations that are working with us, requests that Congress enact legislation consistent with the following principles:

1. *Local government choice*: Local governments must have the option to use flow control as one of the management tools available to them. This includes the right to exercise authority over all municipal solid waste, residential as well as commercial.

2. *Pro-environment, pro-recycling*: Individuals and businesses should be free to make their own arrangements to divert recyclable materials from their own waste stream, notwithstanding existing local flow control authority.

3. *Pro-Competition*: Flow control legislation should guarantee the private sector the right to compete for the contracts whenever State or local governments enact new laws, ordinances, or regulations regulating the flow of MSW.

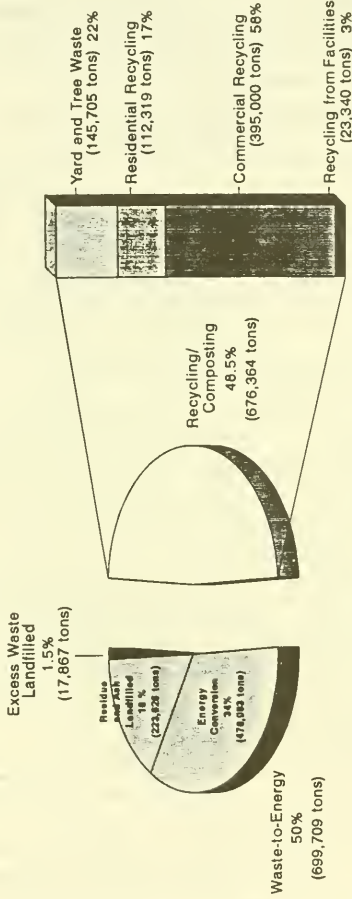
In addition, Congress should allow existing flow control authority to continue not only for existing projects where financing was based upon flow control, but for all future projects where flow control will be necessary to implement a local government's comprehensive long-term municipal solid waste management plans.

Both bills authorize States and local governments to exercise flow control under certain conditions and restrictions. S. 2227 is far more restrictive than S. 1634. As you know, serious discussions on waste flow control began more than 2 years ago. During the past 18 months negotiations have been on-going and resulted in the introduction of S. 1634 which was opposed by large waste haulers who viewed and declared it anti-competitive. After months of negotiating between the various interested parties, we have S. 2227. As introduced, S. 2227 is not the solution. However, with some changes that reflect the principles we have outlined the bill can be greatly improved and win the support of local government.

Therefore, I have one further request as you consider options for granting waste flow control authority. If we support a bill that requires a new designation process that conflicts with the existing process in our States, we ask that you include "substantial equivalency language" in any proposal to be considered by the full committee or on the Senate floor.

Thank you for your time and attention. I will be happy to address any issues or questions the committee may have at this time.

Figure 2 Hennepin County Waste Disposition 1993



Waste disposition for 1993: 1,393,940 tons

4/01/94

Ohio Solid Waste Districts Flow Control Survey Results

The State of Ohio has invested millions of dollars in solid waste management planning. Flow control is an integral component in implementing District plans. Given the U.S. Supreme Court decision in C & A Carbone v. Town of Clarkstown banning flow control, the Solid Waste Districts in Ohio anticipate the following economic losses and plan implementation barriers.

District	Potential Impact
Adams-Clermont	Loss of \$30,557 in state and \$228,543 out of state generation fees. A total of \$259,100. Moreover, the District may no longer have the ability to negotiate with private facilities to keep prices down.
Ashland	Loss of ability to maintain landfill operation salary and appropriate closure funds. Without a generation fee, the landfill may close if enough waste is not being transported there. Without the ability to maintain landfill operation costs, the landfill may close.
Ashtabula	
Auglaise	Lost generation fees without flow control; will force closing of landfill. This district will lose fees of \$250,000.
Belmont-Jefferson	Without flow control this district is "out of business" for all intents and purposes.
Brown	
Butler	Lost generation fee of \$.50 per ton will result in a loss of revenue totalling \$200,000 per year.
Carroll-Columbia-Harrison	Loss of \$150,000 per year, as well as, \$417,000 from out of county landfill disposal on volume basis.
Clark	loss of \$2.00 per ton generation fee.
Clinton	
Cosh.-Licking-Fairfield-Perry	
Crawford	It will jeopardize the very existence of the County owned facility.
Cuyahoga	Transfer station planned in the future at a cost of \$5.0 million will have a 3% increase due to difference in Revenue Bonds vs. open market financing.

District	Potential Impact
Darke	Risks the loss of contractual fees with Rumpke. With no money coming into the District, the Commissioners may be forced to absolve the district.
Defiance-Fulton-Paulding-Williams	Very damaging to contract with Laidlaw landfill. Potential loss of \$1-2-1 fee. Undermines District's ability to pay \$3 million closure costs.
Delaware-Knox-Marrion-Morrow	
Eric	District is present funded by disposal fee of \$2.00 per ton, but needs additional revenue in the future to plan programs. A generation fee of \$2 per ton is proposed. Without it, the disposal fee must be raised, thereby penalizing users of the in-District landfill or programs will be dropped.
Gallia-Jackson-Meigs-Vinton	None
Greene	This district may lose \$300,000 per year in generation fees and may no longer be able to implement their solid waste management plan.
Guernsey-Monroe-Morgan-Muskingum-Noble-Washington	This district may lose \$265,000 in 1994 and \$360,000 in 1995 due to loss of contracts for flow control. There will be no plan implementation because they may not be able to collect the contract fees.
Hamilton	This district has no indebted facility but had hopes of using flow control as a mechanism of managing its waste stream. Limits the ability of the District to involve Citizens in the siting of new SWM facilities. Also limits the District's ability to provide a "level playing field" for private waste haulers competing for waste generated in the District.
Hancock	Jeopardizes \$1.8 million annual appropriation for a county owned and operated BAT landfill. Plan implementation will be affected in that the \$140,000 annual fees generated may be jeopardized.
Henry	None
Holmes	This district needs flow control to fund the \$1.5 million closure of their landfill. They hoped to do this by using revenue bonds for a transfer station.

District	Potential Impact
Huron	Potential loss of waste flow to an integrated solid waste system; undermines the District's ability to efficiently operate their facilities
Lake	Flow control needed due to their expected expenditure of \$10 million to upgrade their landfill to a B.A.T. facility.
Lawrence-Scioto	None
Logan	None
Lorain	None
Lucas	This district may lose \$50,000 a year in contractual fees which they may not be able to collect without flow control.
Mahoning	
Medina	This district may lose on site collected fees amounting to \$5.8 million a year.
Mercer	
Miami	
Montgomery	Contract with private composting facility may be jeopardized: \$1.7 million to be paid this year.
North Central Ohio	Generation fee of \$4/ton (ratified by represented population) may be lost. Its start date was June 1, 1994.
Ottawa-Sandusky-Seneca	Finalizing plan implementation: estimated that lost fees could cost approximately \$900,000/year.
Pike	Have retained tipping fees of \$1.50 in district, \$3 out of district in state and \$1.50 out of state.
Portage	May lose a \$9.60 per ton generation fee.
Preble	
Putnam	Need flow control to support effort to bring county landfill into compliance with BAT requirements: cost \$1 million, EPA estimates that closing the landfill would cost \$5 million.
Richland	

District	Potential Impact
Ross-Pick-Highland-Fayette	Currently have no generation fee but were planning to use one; its use has been already ratified by the public.
Solid Waste Authority of Central Ohio (Franklin County)	City of Columbus is the owner of waste-to-energy facility; without designation, it will have to start paying higher tipping fees; tipping fees are likely to double. The closure of this facility could result in an \$180 million loss. The facility provides citizens of Columbus with electricity without the facility this could result in an \$8 million loss. Generation fee of \$49/ton struck down in post- <i>Carbone</i> decision, <i>Mid American Waste Systems v. Lee Fisher</i> .
Stark-Tuscarawas-Wayne	
Summit	\$2.75 per ton generation fee may be lost.
Trumbull-Geauga	Currently have export fees they send waste to an outside facility. Transfer facility to be built; will need flow control to ensure viability of the new facility.
Van Wert	No generation fee. This district gets a donation from a transfer station. Without the ability to implement flow control this district's recycling budget will be cut in half.
Warren	
Wood	This district needs to keep flow control or they will have to sell their facility.
Wyandot	Little or no impact felt. They would like to reserve it for future use regarding an in-district tire facility.

Phone survey conducted of each solid waste management district; information self reported by each District

For additional information please contact:

Randy Hartmann, President
Organization of Solid Waste Districts of Ohio
1632 Central Parkway, Room 202
Cincinnati, Ohio 45210

Phone: (513) 333-4719 Fax: (513) 763-4641

STATEMENT OF MICHAEL J. HOGAN, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Good morning, my name is Michael J. Hogan and I serve as Counsel to Robert C. Shinn, Jr., Commissioner of the New Jersey Department of Environmental Protection. Commissioner Shinn asked me to represent him and the Department at today's proceedings. I would first like to thank Senator Lautenberg for holding this forum on the extremely important and timely issue of flow control.

By way of background, New Jersey has been implementing a comprehensive statewide solid waste management program for the past 18 years. For the past 14 years, dating back to 1979, New Jersey has administered formal rules on a statewide basis for flow control of all nonhazardous solid waste from our 567 municipalities and 21 counties. Through our State and county planning program, 12 modern, lined county-wide landfills, 5 regional incinerators, and 14 major transfer stations have been brought on-line. Collectively, these 31 major facilities represent the primary statewide infrastructure to handle the 7 million tons of solid waste requiring management from our nearly 8 million residents annually. Each of these facilities was planned, technically reviewed, permitted and financed under the premise of guaranteed waste flow as provided for in New Jersey statutes and regulations. Collectively, these 31 major facilities represent over \$2 billion in capital investment. It is probably fair to say New Jersey has one of the most, if not the most comprehensive statewide solid waste program in the nation.

Waste flow control is inextricably woven within New Jersey's solid waste management program, in terms of protection of human health and the environment, our impact assessment and engineering design review process for all facilities is significantly based upon flow control. Such fundamental permitting issues as traffic analysis, on-site vehicle flow, mandatory truck routes to and from facilities, system and equipment design capacities, waste generation and composition analysis, and incinerator emissions limitations are calculated and reviewed based upon specific service areas and local circumstances defined by our waste flow rules.

In terms of capacity, the 12 county-wide landfills and 5 regional incinerators represent approximately 13,000 tons per day of disposal capacity, which accommodates the majority of the State's estimated long-term disposal needs. Each was developed to service the needs of defined service areas. Clearly, the existence of flow control and franchises under New Jersey's utility-based solid waste disposal program was critical in the planning, financing, and public acceptance of these projects. Additional new capacity is under engineering design review or in planning stages to accommodate the estimated shortfall of 2 million tons of in-State disposal capacity per year in 1995 when the State is anticipated to achieve its 60 percent total waste stream recycling rate. Our stated goal is to achieve self-sufficiency in disposal capacity by the end of the decade. We *do not* want to rely upon our sister States for disposal capacity on a long-term basis. Following peak conditions in 1988, we have annually reduced exports and, currently, less than 20 percent of our generated waste is disposed of out-of-State. Flow control is absolutely critical to enable us to complete the job and take charge of our own disposal situation.

With respect to recycling, New Jersey has documented a 48 percent total waste stream recycling rate based upon calendar year 1992 statistics. We view our 60 percent statewide target as a realistic and achievable goal by the end of 1995. The State has also adopted an integrated solid waste management strategy which emphasizes source reduction. Detailed programs are under way statewide in the areas of waste auditing, yard waste management, volume-based collection, toxics reduction, procurement, and education to achieve our source reduction goals.

I should also point out that the financial markets which finance the \$2 billion of capital are watching this process closely. Should waste flow regulation not be permitted in the future, the financial ramifications to the counties and municipalities could be enormous, and potentially have an adverse effect throughout State and local government.

I would like to now more specifically address the most recent draft of Senator Lautenberg's Flow Control Act of 1994, Commissioner Shinn has previously submitted comments on the draft bill through a letter dated June 21, 1994, and he has provided modifications that the department believes will offer the best protection for States such as New Jersey. As indicated in the Commissioner's letter, the major provisions of the draft as originally proposed, with respect to New Jersey, would provide for the following:

1. Flow control authority would be authorized under the State and county program we have administered since December 1979 for residential, commercial, insti-

tutional and industrial solid waste, including incinerator ash and construction and demolition debris.

2. Grandfather provisions would pertain to all facilities currently provided with waste flow pursuant to N.J.A.C. 7:26-6.5, disposal arrangements covered by any contract entered prior to May 15, 1994, future flows to facilities which have been formally incorporated as administrative provisions within approved county solid waste plans or the statewide solid waste management plan, and under the designation before a date section, the laws and regulations found at N.J.A.C. 7:26-6.6 and 6.7 which would allow New Jersey to continue to modify waste flows to previously recognized and future designated facilities without triggering the "competitive designation process" which essentially would have already been completed.

3. Future facility designations not already provided for within county or State plans or our waste flow rules at N.J.A.C. 7:26-6 would be subject to the "uncompetitive designation process" outlined on pages 5-7 of the draft bill.

Regarding the original draft, New Jersey has two substantial concerns. The first is concern that future (Post May 15, 1994) Activities of New Jersey and its political subdivisions will be subjected to unnecessary litigation in Federal court on the issue of the competitive designation process. Historically, litigation on solid waste matters has been, for the most part, in the State courts including our Supreme Court. These courts have tested New Jersey's solid waste program over the last 20 years and found it to be sound. To now provide a new Federal forum will potentially subject New Jersey's solid waste program to many of the same fundamental challenges which have been thoroughly litigated by the New Jersey courts.

The "competitive designation process" and the "limitations" subsections on pages 4 and 5 of the draft will be subject to varied interpretation which will cause much uncertainty in the disposition of solid waste and with those bond holders who financed the investment made by counties whose capital is vital to develop future state-of-the-art facilities in New Jersey.

Therefore, after working cooperatively with other New Jersey counties, the Department has recommended replacement language to subsection (A)(1)(b) on page 2 of the June 16, 1994 draft bill. I have attached this insert to my testimony today which in summary would provide that the provisions of subsections (b) and (c) of the bill entitled "limitations" and "competitive designation process" would not be applicable to States like New Jersey, which directed and limited the flow of municipal, commercial, institutional and industrial solid waste prior to May 15, 1994. As indicated previously, New Jersey is well on its way to achieving total in-State disposal self-sufficiency and already maintains its own comprehensive planning and facility designation process which is both open and competitive. A second federally mandated designation process would be completely redundant and slow our aggressive efforts to become self-sufficient.

Our second area of concern pertains to subsection (e)(3) entitled "effect on interstate commerce" located on page 13 of the draft bill. We have enclosed a second language insert which would address this point and clarify that flow control is a reasonable regulation of commerce not only toward the future, but retroactively as well for the States which had pre-existing flow control programs in operation. This is critical language to avoid lengthy and needless court proceedings which would undoubtedly challenge the validity of any State's flow control laws prior to the enactment of Federal law in this area.

To conclude, flow control is the foundation of New Jersey's entire solid waste management system. We are not alone. It is our understanding that over half the States now utilize flow control to some extent. We strongly support congressional action to authorize States to administer flow control as a legitimate exercise of planning and regulatory authority as I have outlined for you today. I thank you for this opportunity to present testimony today.

INSERT 1

Replace Subsection (a)(1)(B), page 2, lines 21-26 and page 3 lines 1-17 as follows:

"(B) Direct, limit, regulate, or prohibit the transportation or disposal of municipal solid waste, as defined in subsection (g)(2), including incinerator ash from a solid waste incinerator unit or construction debris or demolition debris, generated within the boundaries of the State or qualified political subdivision and designate waste management facilities to which any such municipal solid waste shall be transported or disposed, if, before May 15, 1994.

(i) the State or qualified political subdivision adopted a law, ordinance, regulation or legislative or administrative provision, including a solid waste management plan, that pertains to the transportation or disposal of municipal solid waste generated within the boundaries, and

(ii) directed, limited, regulated, or prohibited the transportation or disposal of municipal solid waste under the law, ordinance, regulation or legislative or administrative provision.

Any State or qualified political subdivision meeting the requirements of this subsection (a)(1)(B)(i) and (ii) may also, after the effective date of this amendment, direct, limit, regulate or prohibit the transportation and disposal of municipal solid waste from any existing or future waste management facility to any other existing or future waste management facility, without regard to subsection (b) or (c) and"

INSERT 2

Page 13, lines 18-24, replace paragraph (3) with the following new paragraph:

"(3) EFFECT ON INTERSTATE COMMERCE. - Any contract or agreement described in subsection (e)(1)(A) or (e)(1)(B), and any law, ordinance, regulation, or legislative or administrative provision described in subsection (e)(1)(C), shall be a reasonable regulation of commerce by any State or qualified political subdivision, retroactive to the effective date of the contract or agreement, or to the date of adoption of any such law, ordinance, regulation, or legislative or administrative provision."

STATEMENT OF RICHARD F. GOODSTEIN, DIVISIONAL VICE PRESIDENT, BROWNING-FERRIS INDUSTRIES, INC.

Mr. Chairman, on behalf of Browning-Ferris Industries I appreciate the opportunity you have given us to testify today on the subject of flow control. Flow control naturally has major implications for BFI. We are persuaded that the issue can be resolved rather quickly by legislation that protects existing facilities whose continued viability rests on flow control. We are equally persuaded that market forces will meet municipal solid waste management needs in the future, so that no prospective flow control authority needs to be granted.

Summary of BFI's Position on Congressional Flow Control Legislation

BFI believes that Congressional action is necessary to assure the viability of existing projects that are flow control-dependent (though some investment banking experts insist bonds are not at risk even without congressional action), and therefore BFI supports grandfathering existing flow control arrangements. But as to the other objectives identified by flow control proponents—enabling local governments to implement municipal solid waste management programs, assuring the construction of recycling and composting facilities, and encouraging innovation—BFI is convinced that in each case the free market provides a better solution than does a restriction on commerce. We urge Congress not to enact prospective flow control legislation unless and until it becomes clear that the free market cannot respond to the legitimate local government concerns about municipal solid waste management in the future. For the reasons identified in this testimony, we believe the free market has, can, and will provide the public with the range of services it needs and wants, and it will do so in a cost-effective and efficient manner.

Constitutional and Policy Framework For Approaching The Flow Control Issue

What appears at first glance to be the seemingly minor Federal interest in trash is actually a surrogate for much more important considerations. At root, Congressional flow control legislation is an interference with interstate commerce. There is little question that Congress has authority to so interfere. The question Congress needs to ask is should it.

Senator Daniel Patrick Moynihan answered the question recently in the context of the Senate Committee on Environment and Public Works' recent consideration of legislation to restrict the interstate movement of municipal solid waste by observing, "A bill limiting interstate commerce in any article is not good policy." His reasons for making that observation go to the core of what makes the United States a nation rather than a mere confederation of States. Were States given the authority to restrict the export of oil, corn, manufactured products, or even waste and waste processing capabilities, the nation surely would not have developed economically in the manner it has, nor would a sense of unity have overcome perceived differences among States.

In approaching the flow control issue, we urge Congress to set a very high hurdle for interfering with interstate commerce. Congress should interfere with the free flow of interstate commerce only under extraordinary circumstances, and only then when legitimate objectives cannot be protected any other way. We suggest this as a premise for many reasons.

First, there is little doubt that interferences with interstate commerce distort markets, and that generally speaking, the public is best served through free markets. It is ironic that at a time when the United States is pursuing policies through NAFTA and GATT that would extend the benefits of free commerce to the rest of the world, there are those who would use flow control legislation to truncate commerce at home. The waste management market is no less benefited by the free flow of commerce than the full range of goods and services that stand to benefit from NAFTA and GATT.

Second, there is a full range of laws that protect the public in connection with solid waste management services without interfering with commerce in the way flow control would. Antitrust laws protect the public against price gouging. State and local solid waste mandates in favor of recycling and composting and various landfill bans, for example, are fully capable of being carried out without flow control. Indeed, most communities routinely meet statewide reduction, recycling, and composting mandates without resorting to flow control. Health and safety laws can and should be enforced to assure that all waste—both residential and commercial—is managed in a way that will not endanger the public.

Finally, at a time when the Administration and so many in Congress are rallying behind the notion of "reinventing government," which seeks to activate the marketplace to perform functions commonly associated with government, Congress should

be hesitant to confer monopoly power on government in an area in which there is a vibrant, highly competitive private sector.

The waste services industry is not alone in having deep misgivings about prospective flow control authority over various aspects of the waste stream. The National Association of Manufacturers has written to Congress to convey its opposition to flow control. Similarly, the U.S. Chamber of Commerce has cautioned Congress not to interfere with commerce. Recycling interests are adamant that commercial recyclables be excluded from any flow control regime.

Protecting Existing Flow Control Arrangements Is a Justifiable Interference With Interstate Commerce

If Congress starts from the premise that it should interfere with commerce no more than necessary, it should assess what interests are being asserted by flow control proponents in advancing flow control and determine whether those interests can be met in a manner that does not interfere with commerce more than necessary.

The record is not clear that municipal bonds in support of publicly-financed waste facilities are at risk even if Congress does not act. The Kidder-Peabody firm has stated, "For now, we believe most solid waste disposal bonds are safe because of multiple streams of revenue backing the bonds or fees that are very competitive." (Kidder, Peabody "Municipal Advisory," June 15, 1994). Standard & Poor's has stated that its "examination of over 20 municipal solid waste/resource recovery financings suggests that [the Carbone decision] will have a limited impact on creditworthiness." (*Creditweek Municipal*, May 30, 1994.)

Nonetheless, we believe it is equitable and fair to ensure the viability of existing flow control-dependent facilities. The alternative of exposing these facilities and ultimately taxpayers to considerable losses, even if such losses are far from a certainty, justifies Congressional relief. Congress cannot protect this legitimate interest other than through grandfathering existing flow control arrangements, and it is for this reason that BFI has advocated passage of such legislation.

Other Legitimate Interests Can Be Met Through A Free Market

Many flow control proponents advocate not simply protecting existing flow control arrangements but having Congress confer on State and local governments unfettered flow control authority in the future: the right to confer on themselves a function that is now carried out by the private and public sectors.

An examination of the rationale for flow control put forward by its proponents makes clear that the free market can meet each of their legitimate concerns.

Local Governments Carry Out Their Responsibilities Without Flow Control

First, flow control proponents assert that flow control is necessary for them to meet their responsibility to implement municipal solid waste management programs. This rationale confuses the recognized responsibility local governments have for enforcing environmental, health, and safety laws with actually performing a function that has historically been handled mainly by the private sector. The notion that there would be chaos in running a solid waste program absent flow control is debunked by the fact that States without flow control appear as able to meet various reduction, recycling, composting, and other diversion mandates as do States with flow control.

Local governments have responsibility for assuring that health and safety laws are followed at restaurants, yet no one suggests that local governments run restaurants that do not meet such laws. Rather, enforcing (through fines, and perhaps withdrawal of licenses) health and safety laws assures that restaurants do not pose a threat to the public. Similar police powers assure that municipal solid waste generators act properly, but do not translate into inherent authority to provide waste services.

Flow control proponents are confronted with the inconsistency of their position in the case of recyclables. Many proponents of unfettered flow control apparently agree that commercial recyclables should be excluded from flow control. The bills introduced by Senators Lautenberg and Heflin do just that. Yet flow control proponents also insist that flow control is necessary "to develop accurate projections of future municipal solid waste flows so that recycling . . . facilities can be properly planned, designed, and financed." It seems impossible to square these two positions. If recyclables excluded from flow control are subject to accurate projections of future volumes—and we believe they are—then so is the entire municipal solid waste management stream subject to accurate projections through various reporting requirements without the impediment of flow control. And if guaranteed waste flows are necessary to build recycling facilities, how do flow control proponents

expect that recycling facilities will be built if recyclables are excluded from flow control? In fact, recycling facilities will be built without guaranteed flows because the market for them exists.

Facilities Are Being Built Without Flow Control

Flow control proponents express concern that facilities will not be publicly financed absent flow control. But the only salient question for Congress should be whether facilities will be built, not how they will be financed. Presumably, whether or not there is flow control will not significantly affect the volume of municipal solid waste generated. States can be expected to continue to have mandates that drive recycling, composting, and other diversions of the waste stream from landfills and waste-to-energy facilities. As a result, recycling and composting facilities will continue to be built to handle diverted materials. BFI has built—without public financing and mainly without the support of flow control—over 80 recycling facilities and 14 composting facilities just since 1988, and BFI is only one of many firms in this business.

BFI has built recycling facilities, without public financing and without flow control as a driving force, in the following locations, among others: Houston, Texas; San Antonio, Texas; Akron, Ohio; Billings, Montana; Bozeman, Montana; Bucks-Montgomery Counties, Pennsylvania; Cape Girardeau, Missouri; Chattanooga, Tennessee; Orlando, Florida; Dubois, Pennsylvania; Great Falls, Montana; Helena, Montana; Huntington, West Virginia; Lake Charles, Louisiana; Lawrenceville, Georgia; Melrose Park, Illinois; Missoula, Montana; Montgomery, Alabama; North Dallas (Longview), Texas; Pensacola, Florida; Rio Grande Valley, Texas; Rockingham/Rutland, Vermont; Chicago, Illinois; Eastern Shore, Maryland; Roanoke, Virginia; Tampa, Florida.

BFI also owns and operates composting facilities—all privately financed, built to serve the free market, and not predicated on flow control—at the following locations: Brevard, Florida; Arbor Hills, Michigan; East Bridgewater, Massachusetts; Fall River, Massachusetts; Hawk Ridge, Maine; Holly Springs, North Carolina; Lorain, Ohio; New Halls Ferry, Missouri; Newby Island, California; Pine Bend, Minnesota; Quad Cities, Illinois; Irvine, California; La Pata, California; Suffolk, Virginia; Adel, Georgia; Vinemont, Alabama; Elliott, Mississippi; Plumerville, Arkansas; Star, North Carolina; Fairmont, West Virginia; Walkerton, Indiana.

Congress should not be troubled that rural communities are somehow uniquely dependent on flow control to effect recycling and composting alternatives. Even a cursory review of the preceding lists shows a substantial number of rural areas served.

If this is the experience of only one company—albeit a large one, but one with a minor market share overall—can the notion that flow control is necessary to support recycling and composting facilities truly remain viable?

Flow control proponents cite examples of proposed recycling projects that are threatened as a result of the *Carbone* decision. One example cited is in San Diego, a facility with recycling costs above \$200 per ton of materials recovered. The *San Diego Union-Tribune*, in an editorial, called the plant “a monstrous mistake.” As noted in a recent *Wall Street Journal* article, this facility is widely recognized as an example of how *not* to develop materials recovery facilities. Competition would have precluded such a facility from becoming a burden to the taxpayers. Congress should be wary of interfering with the free flow of commerce in the interest of preserving such facilities that are not economically viable without artificial support.

The Free Market, Not Government Monopoly, Encourages Innovation

Flow control proponents insist that innovation in waste management technologies will be stifled absent a Congressional grant of flow control authority in the future. BFI agrees that Federal policy should enhance rather than impede innovation. Most innovative technology, however, is developed in the private sector. BFI receives from entrepreneurs many proposals each month for new ways to process waste. Some of these may actually handle substantial amounts of the waste stream some day. If Congress confers on local governments the ability to monopolize waste disposal—as flow control proponents request—these inventors and dreamers would not have the same incentive to innovate in the future as they do today.

A central premise of “reinventing government” is that innovation is triggered not through a government monopoly but through full-blown free market competition. BFI believes there is no basis for concluding that interfering with the free market in connection with municipal solid waste is somehow the one case in which government should be taking over a private sector function.

Developments in connection with municipal solid waste management over the past 6 years demonstrate conclusively that the free market works as effectively in

connection with solid waste as it does for other goods and services. Most Members of Congress and, indeed, the public locked in on the municipal solid waste issue in the immediate aftermath of the garbage barge of 1987. That is when concerns over the landfill crisis and skyrocketing tipping fees were commonly heard. But because the laws of supply and demand work in connection with solid waste as elsewhere, various new waste processing and disposal facilities were developed to meet the situation. In most places in the country today, tipping fees are down substantially from the late 1980s as a result.

In addition, the late 1980s saw a proliferation of state recycling and composting laws and various landfill diversion requirements. These mandates triggered the rapid development of privately owned and operated materials recovery and composting facilities. In that time, BFI has become the nation's largest and evidently most successful recycler. Of the over 100 recycling and composting facilities BFI now owns and operates, well over 80 have been built since 1988—a free market response at its best. Indeed, BFI's recycling business is the single fastest growing of all its business lines, and it is profitable.

Those who insist that flow control is needed to raise revenue (without directly raising taxes) to pay for money-losing recycling facilities are evidently not benefiting from the free market in the same way that BFI is. But the experience of those who can't make recycling work should not convince Congress that recycling can't work. It does!

Environmental Policy is Disserved Through Flow Control

Finally, we are concerned that flow control would interfere with the functioning of the recycling marketplace. Among the most effective ways to alert the public to the importance of environmentally sound solid waste generation practices is by "pay-per-throw" systems and other market-based programs that alert waste generators to the cost of their behavior. Flow control typically masks the effect of individual behavior by charging one lump sum for disposal that covers a variety of services. We believe the public is better served by having more information, rather than less, and that the more they know about the cost of each aspect of a solid waste management program, the more cost-effective and efficient these programs will become.

Some flow control proponents assert that the reason the private sector opposes prospective interferences with commerce is because the private sector wants nothing more than to dispose of waste in the cheapest available landfill. The evidence is otherwise. Just one year ago it was the private sector that was resisting efforts by today's leading flow control proponents to weaken and delay major improvements in strict Federal landfill standards. It was the private sector that was urging Congress and EPA not to delay the effective date of regulations that would make landfills throughout the country more environmentally protective and ultimately more expensive. And it has been the private sector that has been urging on Congress Federal standards to assure that recycling and composting facilities incorporate suitable standards of environmental protectiveness.

The record could not be more clear that the private sector has been in the forefront of efforts to get waste out of old dumps and into more environmentally protective facilities. It is good for the environment and good for our business to move beyond the era of cheap dumps.

In summary, we support grandfathering existing flow control arrangements—a position we share with the Sierra Club—but as to each of the other interests cited by flow control proponents on behalf of prospective flow control authority, we believe the free market provides the superior answer to each of the interests identified.

Assessment of the Heflin and Lautenberg Flow Control Bills

BFI is guided in assessing the flow control bills introduced by Senators Heflin and Lautenberg by the principles identified above, specifically, the view that Congress should not interfere with commerce any more than necessary. We therefore believe that the bill introduced by Senator Heflin, S. 1634, would interfere with commerce far more than necessary. It provides that any municipal solid waste generated within a jurisdiction may be designated to be processed or disposed of at the facility of the local government's choice. This would permit local governments to interfere with interstate commerce at a whim, and pays no deference to the functioning of the marketplace.

It is an unsettling prospect to be in the private sector and have Congress confer authority on local governments that could totally displace a vibrant and competitive private sector industry. It is not just the waste services industry but the public that ultimately benefits from the freest possible movement of interstate commerce. It is

the public that benefits from a "reinventing government" approach that seeks to activate the marketplace rather than conferring monopoly power on government. It is the public that benefits from innovations that could be stifled in the absence of free market forces being applicable to solid waste management. S. 1634, in BFI's judgment, is simply not an appropriate Congressional response to the situation created by the *Carbone* decision.

The flow control bill introduced by Senator Lautenberg, S. 2227, on the other hand, comes much closer to meeting the concerns of local governments in a way that takes advantage of the free market and also encourages recycling. By grandfathering existing flow control laws that have resulted in an actual waste designation, the bill provides relief in a manner that approaches the standard we recommend: addressing legitimate interests in a way that does least harm to interstate commerce. We would prefer a grandfather provision that does not lock in flow control arrangements in perpetuity as S. 2227 would. We believe that the public is best served in ultimately moving into a free market environment.

We applaud the bill's creative approach to recycling, whereby communities seeking to use flow control of residential waste in the future must establish recycling programs as a predicate for flow controlling residential wastes. We remain convinced, however, that recycling is best served through Federal policy that increases demand for post-consumer recyclables rather than merely increasing supply.

BFI also applauds the competitive process that S. 2227 would establish should a community be authorized to flow control residential waste in the future. BFI is happy to compete against the public sector; such competition is economically health. We are understandably leery, however, about a system in which the entity we are competing against is also the judge of the fairness of the process. Should Congress insist on granting prospective flow control authority in any respect, a competitive process at least as rigorous as that established under S. 2227 is essential.

The decision inherent in S. 2227 to avoid flow control of commercial waste in the future is consistent with our view that a free market is preferred to government monopolization. The private sector has collected, processed, and disposed of the huge preponderance of commercial waste generated in the United States throughout the modern era. The local grocery store, drug store, apartment house, shopping center, or any other business establishment typically contracts with a private hauler to collect and dispose of its trash. This is not a function that local sanitation departments perform except in very unusual circumstances.

For this reason, we believe S. 2227 is correct in leaving commercial management to function in accord with the free market rather than be subjected to the interferences in the free flow of commerce embodied in flow control.

BFI believes the public is not well served by conferring flow control authority over household waste in the future. BFI believes that franchise arrangements in connection with household waste, on the other hand, should be part of the landscape of the future. We are drafting legislative language that we believe does not saddle the public with the interference with commerce embodied in flow control but would nonetheless give the public the benefits of well thought-through franchising arrangements.

At least with a franchise the competitive pressures hold down consumer prices. Under flow control, the location and presumably the price at which household waste collectors dispose of waste is not subject to competitive pressures and therefore the public is denied all the benefits of the marketplace. If Congress is intent on providing prospective flow control authority in connection with household waste, however, we recommend that such waste be defined to include trash from houses but not apartment buildings. Apartment building trash has historically fallen into the commercial waste handling universe, and we see no reason for changing this.

We also urge Congress to apply the same definitions and compliance standards to both flow control and interstate legislation.

Conclusion

The *Carbone* decision has created an actual concern and a series of hypothetical concerns regarding municipal solid waste management. The actual concern is for the viability of facilities that already exist, and that may be at risk absent enforceable flow control laws. BFI encourages Congress to address that *actual* concern. A grandfather-only solution should not be so limited as to put existing facilities at risk but not so expansive as to lock in a government monopoly in perpetuity.

The hypothetical concerns regarding the functioning of solid waste management programs in the future are best left to the free market to resolve. Nothing about a grandfather-only approach would preclude the 104th Congress from addressing the issue in the context of a full-blown reassessment of RCRA. If there is reason to be-

lieve that the free market will not provide an adequate response next year or thereafter, Congress may conclude that a wholesale interference with the free flow of waste in the future is justified. Such action should not be taken lightly, however, and we believe Congress has no reason to conclude that the free market will be inadequate in this area.

We stand ready to assist the subcommittee in crafting an appropriate response to the flow control issue.

Thank you for considering our views. I would be glad to answer any questions.

STATEMENT OF GARY S. LORFANO, U.S. CONFERENCE OF MAYORS AND THE MUNICIPAL WASTE MANAGEMENT ASSOCIATION

Mr. Chairman and members of the subcommittee, my name is Gary S. Lorfano and I am a member of the Town Council of the Town of Scarborough, ME. I am also Chairman of Regional Waste Systems, a publicly owned and operated municipal waste management system in Portland, Maine. I am testifying today on behalf of RWS' 31-member municipalities, the United States Conference of Mayors, its affiliate, the Municipal Waste Management Association, and the hundreds of other local government entities—cities, counties, and solid waste management authorities—which rely on flow control to implement integrated municipal solid waste management programs.

Let me begin by noting the heightened concern of State and local government throughout the country regarding the handling of solid waste. As EPA has stated, "[a]s a nation we are generating more garbage all the time, and we don't know what to do with it. Everybody wants us to pick it up, and nobody wants us to put it down." Efficient management of solid waste involves complex issues—public health, environmental and, increasingly, financial. For many communities, municipal solid waste management has become one of their fastest growing costs. In fact, as you know, in 1976 when adopting the Resource Conservation Recovery Act, Congress recognized that municipal solid waste presented municipalities with "serious financial, management, intergovernmental and technical problems." Nevertheless, Congress found that collection and disposal of municipal solid waste should continue to be primarily the responsibility of State and local government, and increasingly local government has been given the responsibility to ensure the availability of environmentally sound solid waste management. In State after State, including Maine, municipalities are required to provide disposal services for commercial and domestic waste generated within their borders.

Flow control ordinances are an essential element in implementing local government decisions to develop environmentally advanced, integrated municipal solid waste management. Those decisions are difficult and involve extensive analysis of the combination of waste management technologies most appropriate for a given community, the amount of solid waste that a municipality is responsible for and the manner of financing the facilities necessary to handle that solid waste. When the decision has been made regarding the best long-term infrastructure for managing waste (e.g., recycling, composting, waste-to-energy, etc.), flow control and put-or-pay contracts have been crucial elements to implement such decisions.

Perhaps it would be helpful if I described how Regional Waste Systems has relied on flow control for its successful management of the municipal solid waste from 31 municipalities in the Portland, Maine area. RWS is a non-profit corporation established in 1985 by its 21 member municipalities to meet their statutory obligations under Maine law (which is typical of other states) to provide a solid waste disposal facility for all residential and commercial waste generated within each town's boundaries. Under what is called an interlocal agreement, adopted under Maine law, each of the 21 cities and towns delegated a portion of its powers to form RWS in order to meet their individual solid waste obligations. Through waste handling agreements with RWS, each town pledged all the waste generated within its boundaries to RWS except for any waste which was being recycled. The agreements also required each town to enact a flow control ordinance designating the RWS facility as the location where all solid waste generated within the town would be delivered. RWS has been able to provide solid waste disposal services for 10 additional municipalities on a contract basis, bringing to 31 the number of Maine municipalities served by this public, non-profit corporation.

During the early 1980s, RWS in conjunction with the Greater Portland Council of Governments conducted a lengthy and careful evaluation of alternative solid waste disposal methods to determine which would best promote public health and environmental interests. The report concluded that, based on "a careful evaluation of both

resource recovery and non-resource recovery systems," resource recovery through waste-to-energy is "economically and environmentally preferable [to] all the resource recovery and non-resource recovery solid waste alternatives practically available." The same report concluded that "control over the supply of waste to a resource recovery facility or other capital intensive solid waste disposal system is essential to facility development."

After receipt of this report and following numerous public meetings, the Board of Directors of RWS, composed of representatives from each of its member municipalities, decided to issue sufficient amounts of revenue bonds to finance construction of a 500-ton per day waste-to-energy facility which began operations in the fall of 1988. Prior to that time, landfilling was the primary means of solid waste disposal for all the RWS member municipalities. However, consistent with Federal policy, Maine's Legislature has required an integrated approach to solid waste management, based on the following hierarchy: (1) reduction of waste; (2) reuse of waste; (3) composting of biodegradable waste; (4) waste processing which reduces the volume of waste needing land disposal, including waste combustion with energy recovery; and (5) land disposal. Thus, RWS' decision to adopt resource recovery as its primary solid waste management method was preferable under State and Federal policy to the landfilling methods that RWS members had used in the past (electricity generated by solid waste combustion is sold to a public utility, and the revenues from those sales are used for bond repayment, thereby reducing the tipping fees charged for solid waste management). Moreover, in recognition of State policy and through reliance on flow control, RWS has initiated a comprehensive solid waste management plan, providing not only resource recovery at the waste-to-energy facility, but also recycling services with containers owned by RWS and available in all its communities, composting of yard waste, educational services for schools and community organizations, landfilling for by-pass waste at a landfill owned by RWS and disposal of ash residue from the facility at an ashfill owned by RWS. Outstanding indebtedness is approximately \$100 million for this integrated solid waste management system. Not only have member municipalities adopted flow control ordinances to secure a revenue stream for repayment of the bonds, but they also have pledged their full faith and credit for payment of tipping fees for disposal of waste.

But RWS' decision to develop a long-term, environmentally advanced waste management system had a cost. It would have been cheaper—for the short-run—to have continued to place primary reliance on landfilling. In fact, as Congress' Office of Technology Assessment has recognized, if left to the normal operation of the economic forces of the marketplace, waste management will gravitate to the lowest cost, short-term alternative. See "Facing America's Trash: What Next for Municipal Solid Waste?" at 275. Thus, in order to pay for our environmentally advanced waste management system, we had two choices: use flow control authority to direct MSW to our system or finance our waste management system solely with taxes. Such tax subsidies, however, are highly disfavored. "It is just common sense, as well as good economic sense, that those responsible for solid waste management costs pay the costs these activities impose on society. So another step that local and municipal government can and should take is to investigate variable rate pricing . . . [whereby] the price charged for waste services changes with the weight or volume that each household produces" [William K. Reilly, Administrator, U.S. EPA, Statement Before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works 13 (September 17, 1991); U.S. EPA, "Variable Rates In Solid Waste: Handbook for Solid Waste Officials" (June 1990) (discourages use of general taxes to fund solid waste management because no incentive is provided to reduce waste volume).]

The assurance of receiving the amount of waste projected during the feasibility analysis was a necessary precondition to the financing and construction of the RWS waste-to-energy facility. In fact, the financial institutions which provided financing for the facility required each municipality to adopt a flow control ordinance prior to issuance of bonds. This practical consideration was recognized by Maine's Legislature when it authorized municipalities to enter into long-term contracts for solid waste management services, including put-or-pay contracts, and to enact solid waste flow control ordinances directing all solid waste generated within a community's borders to a specific solid waste facility. In providing this authority, Maine's Legislature recognized that "because of the complicated technology, most energy recovery facilities have high capital costs and long payback periods . . . [which] require a guaranteed, steady supply of waste." Thus, "to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste management, municipalities shall have the legal authority to control the handling of solid waste generated within their bor-

ders." Congress, of course, emphasized these same realities in connection with adoption of RCRA, where the role of flow control in the development of waste management facilities was considered in detail. The legislative record repeatedly emphasizes that financial underwriters and bond purchasers require guaranteed waste flow (volume) as a condition to financing waste management projects. [See, e.g., H.R. Rept. No. 1491, 94th Cong. 2d Sess. 34 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6272; id. at 6248; Ann R. Mesnikoff, Note, "Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home," 76 Minn. Law Rev. 1219, 1225 n. 26 (1992); House Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, 94th Cong. 2d Sess., "Symposium on Resource Conservation and Recovery" 105 (Subcommittee Print 1976) (focusing on the importance of guaranteed waste volume to the financial viability of waste management projects).]

Although I have focused on our experience in Maine, I must emphasize that, in one form or another, hundreds of other towns, cities and counties throughout the country have relied upon similar contracts and ordinances for the development of complex and capital-intensive solid waste systems. Over 20 States have enacted statutes authorizing local governments to adopt flow control laws, and billions of dollars have been invested in waste management systems in reliance on the enforceability of flow control ordinances and put-or-pay agreements. Flow control has enabled these local governments to exercise control over the cost of their solid waste management obligations. This authority is essential to stabilize the cost of solid waste management for the long term, which is quickly becoming one of the biggest expense items in municipal budgets. Without flow control, it is unlikely that municipalities could have issued the indebtedness necessary to finance construction of these technologically advanced, environmentally sound solid waste systems.

EPA recognized these factors in its recent Federal Register notice regarding flow control:

The costs of municipal solid waste management are increasing as local governments plan for new, state-of-the-art recycling, disposal and combustion facilities to replace closing facilities and meet growing capacity needs. Flow control has become a widely relied upon tool to cover the costs of existing facilities and may be a prerequisite to obtain financing for new facilities in many circumstances.

Moreover, the use of flow control offers additional environmental benefits. One example is a significantly increased commitment to recycling. That commitment is evidenced by the fact that in order to encourage recycling, yard waste collection, household hazardous waste collection, etc., local governments' flow control-based integrated waste management programs do not impose any direct charge for such services (the associated costs are recovered through the tipping fees charged for disposal of nonrecyclable MSW). This cross-subsidy, which is made possible because of flow control, is a powerful incentive for recycling and related programs. In addition, flow control statutes are often specifically designed to prevent a situation where recycling programs compete with waste treatment facilities for the same material. For example, under Wisconsin's flow control law, which is typical of the flow control laws in a number of States, a prerequisite for the exercise of flow control authority by local government is a finding that, among other things, use of the designated facility will not undermine other aspects of the community's solid waste management plan, including recycling. And Minnesota prohibits combustion or composting of recyclable materials at resource recovery facilities owned or financed by public agencies unless no other person is willing to accept those materials for recycling.

Furthermore, flow control provides a means of imposing the cost of a solid waste facility on the users of the facility—it provides for user-based financing of State and Federal solid waste mandates rather than relying totally on general taxes or local property taxes to subsidize those costs. As a result, if a city or town brings waste to a facility, the city or town pays the tipping fee for the handling of the waste at that facility. If a private solid waste hauler contracting with private parties brings solid waste to the facility for disposal, it pays the tipping fee for the waste. In either instance, the actual user pays the tipping fee.

It must be emphasized that flow control is not being used as a revenue generator or profit center for local government. Municipal solid waste management is a significant and growing expense—rather than a revenue enhancement—for the local government entities that use flow control authority in connection with municipal solid waste management, and tipping fee revenue is not used to cross-subsidize other government services. For example, Tennessee law specifically prohibits use of disposal fee revenue for any purpose other than solid waste management. Moreover, like RWS, scores of local government entities that rely on flow control are entirely sepa-

rate entities and financially unrelated to the traditional units of local government in their regions—thus, there are no other revenues to enhance through use of flow control.

But more importantly, the purpose of committing a given community to a specific waste management facility or system and the purpose of flow control are one and the same—environmentally sound solid waste management. Focal government entities that employ flow control in connection with municipal waste management do not do so for profit; rather, the fact that a flow control ordinance was adopted indicates that the community involved had decided, as a matter of public policy, that its municipal solid waste can best be managed through use of a designated facility as opposed to other alternatives. As noted above, the adoption of flow control authority effectuates that decision and secures the community's financial participation in the underlying waste management facility or system.

In short, flow control ordinances and put-or-pay contracts were the means selected by many municipalities across the nation for development of fully integrated solid waste management systems. If these existing flow control ordinances and waste designation contracts are invalidated, the cost of these systems would suddenly and unexpectedly completely shift to the local property or other general tax base. Such a shift represents an enormous unfunded government mandate which our already strained municipal tax systems cannot bear.

The Supreme Court's decision on May 16, 1994 in *C&A Carbone, Inc. v. Town of Clarkstown* creates an enormous cloud over the validity of existing municipal solid waste flow control ordinances. While municipalities may attempt to validate their ordinances under a rigorous test enunciated by the Court, this decision may have the effect of encouraging solid waste haulers to ignore and violate local solid waste flow control ordinances, thereby undermining integrated solid waste management for municipalities throughout the United States. Given the Supreme Court's opinion in *Clarkstown*, persuading a State court to enforce such ordinances is a difficult matter. Further, since the Court's decision turned on the Commerce Clause, municipal enforcement of flow control ordinances after *Clarkstown* may give rise to claims for damages, attorneys fees and costs under State and Federal civil rights statutes.

Therefore, we believe that the Supreme Court's opinion in *Clarkstown* has created a situation that requires immediate Federal legislation to validate municipal flow control authority. Justice O'Connor wrote in her concurring opinion that she agreed "that Congress expected local governments to implement some form of flow control," but that Congress' intent had not been sufficiently explicit to prevent application of the dormant Commerce Clause in that case. Justice O'Connor therefore observed:

It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course defer to that legislative judgment.

The legislation being sponsored by Senators Lautenberg and Mitchell provides authorization for flow control ordinances and waste management facility designations which were in place on the date of the Supreme Court decision. This so-called grandfathering provision provides the crucial validation for those projects which were planned, financed and constructed in reliance on flow control. In addition, this legislation would validate flow control ordinances and facility designations retroactively in order to avoid damage claims against municipalities that have implemented flow control ordinances in good faith to maintain the integrity of their solid waste management systems. We also believe that the legislation should be clarified to include various other MSW planning and management actions within the scope of the grandfathering provision. One example of this would be to ensure that municipalities which had entered into put-or-pay agreements prior to the Supreme Court decision but had not formally adopted flow control ordinances have the ability to act within the scope of their existing agreements without the need to undertake again a competitive designation process. Additional examples would include waste management facilities that are designated in the future pursuant to grandfathered flow control authority and municipal solid waste management plans that are in the process of being implemented. Finally, the competitive designation process for future flow control and waste management facility designations should be clarified to be more straight-forward and eliminate ambiguities which could result in costly and time-consuming litigation.

With regard to the ability to adopt flow control in the future, this legislation provides authority for the adoption of new flow control ordinances for residential sources of MSW and recyclables which have been voluntarily surrendered, but not

for commercial MSW sources. In considering that difference in treatment, we would like to emphasize that local governments have long had the primary responsibility to manage municipal solid waste—both residential and commercial—and sought flow control authority solely to satisfy this traditional responsibility, not to seek a competitive advantage over private industry. In fact, flow control helps preserve competition by providing a level playing field for all. Because municipalities are required by law to plan and provide for the management of all municipal solid waste, they must have access to the tools needed to get the job done. If local governments are unable to predict the amounts of waste that will be managed, they will not be able to meet their obligations to develop integrated waste management systems in accordance with State and Federal waste management hierarchies. The feasibility of future publicly-financed material recycling facilities and similarly expensive but legislatively mandated solid waste facilities will be dependent on consistent and predictable amounts of waste flow.

If municipal governments are to be given primary solid waste management responsibility, they must be permitted to adopt municipal flow control ordinances in order to obtain the waste and revenue necessary to meet the financial obligations incurred through the construction of the infrastructure necessary for a fully integrated waste management system dedicated to the waste management priorities of reuse, recycling and resource recovery. Waste management that maximizes environmental protection requires serious capital investment, and municipal officials fear that unless municipal waste is designated to a facility which is committed to waste reduction and recycling, the waste will find its way to the lowest cost short-term disposal method—one that may not be consistent with the concept of a comprehensive, integrated waste management plan and Federal and State waste management hierarchies.

Furthermore, the requirements of RCRA and State mandates regarding the responsibility of local governments for the handling of municipal solid waste do not distinguish between household and commercial waste. Therefore, from a long-term public policy perspective, the inability to control the flow of commercial sources of municipal waste through flow control or waste management facility designations may impact these Federal and State policies. The requirement that municipalities provide environmentally sound, long-term solid waste management capacity will be made significantly more burdensome without the ability to predict the amounts or the characteristics of the solid waste they will be responsible for.

In conclusion, we strongly support passage of S. 2227, which will validate the use of flow control ordinances for municipal solid waste management. We urge Congress to provide municipalities with the ability to use flow control ordinances as an important tool in achieving a secure, fair, and predictable solid waste management infrastructure. Action by Congress during this session is essential due to the uncertainty of the enforceability of existing laws and contracts throughout the country as a result of the *Clarkstown* case.

Thank you for your consideration of this matter, and I will be pleased to respond to any questions you may have.

STATEMENT OF DONALD A. WALLGREN, VICE PRESIDENT, CHIEF ENVIRONMENTAL OFFICER, WMX TECHNOLOGIES, INC.

Thank you, Mr. Chairman. I am Don Wallgren, Vice President and Chief Environmental Officer of WMX Technologies, Inc. (formerly Waste Management, Inc.) I appreciate this opportunity to testify today on proposed Federal flow control legislation and in support of your bill, S. 2227, in particular.

I would like to begin my comments by explaining why we care about flow control. I will then outline our basic position, turn to why we support your bill, and conclude with why we oppose other suggested solutions to the flow control problem.

WHY WE CARE ABOUT FLOW CONTROL

The WMX family of companies provides municipal solid waste (MSW) management services in 48 States. Through Waste Management, Inc. (WMI), our solid waste subsidiary, we operate 136 solid waste landfills and 15,000 waste collection vehicles serving approximately 800,000 commercial and industrial customers as well as 12 million residential customers. Our recycling programs provide curbside recycling to 5.2 million households in more than 600 communities and 75,000 commercial customers. WMI contracts with nearly 1,800 municipalities to provide these services throughout the United States.

In addition, through our Wheelabrator Technologies, Inc. subsidiary, we operate 14 trash-to-energy plants which process about 8 million tons of MSW annually and generate 700 megawatts of electricity for the 400 communities they serve. Wheelabrator also operates composting facilities, waste-water treatment, and biosolids management facilities.

Flow control measures usually involve designation by a governmental entity of one or more waste management facilities to which all or a portion of waste generated within its jurisdiction is "flow controlled" for processing (MRF or composting), combustion or disposal. The effect of such flow control measures is to create a monopoly for the designated facility. Any facility (inside or outside the jurisdiction) that is not designated to receive the flow-controlled waste is denied that waste and the opportunity to compete in that market.

Because all of the services we offer could be severely and adversely impacted by inappropriate flow control legislation, we have a strong interest in contributing to your efforts to identify a fair and effective resolution of the issues associated with flow control.

THE WMX POSITION

We believe that the potential adverse impacts of flow control suggest that if Federal flow control legislation is enacted, it should be consistent with the 7 principles set forth below.

(1) No effect on other authority

Federal flow control legislation should acknowledge and have no effect on the current responsibility and authority of State and local governments to protect the public health and environment through laws, regulations, and permits. Nor should it interfere in any way with a State or local government's authority to decide where to take waste it collects (with its own trucks and employees) for processing, combustion or disposal, or to own and operate a waste management facility. None of those activities involves flow control or requires Federal legislation *unless* the government seeks to require other collectors of waste to deliver it to a particular facility, and to prevent them from delivering it elsewhere.

(2) Residential MSW

Federal flow control legislation authorizing *new* designations should only apply to residential (household) MSW. Recyclables separated from the residential MSW and placed "at the curb" for collection and processing should be included in the "residential (household) MSW" for which flow control measures may be adopted if the jurisdiction chooses to do so. Existing measures that flow control commercial MSW should be grandfathered as discussed in 6 below.

(3) Public planning process

Federal flow control legislation should require that before adopting a flow control measure, the government adopt or amend its existing management plan to specify the circumstances warranting, and the criteria to be utilized in implementing a flow-controlled monopoly.

(4) Required finding

Federal flow control legislation should require that before adopting a new flow control measure, the government involved, following one or more public hearings, make a finding that flow control is necessary to achieve the objectives it has established in its MSW management plan. The finding could be made as part of the planning process (3 above) or separately. If such a finding can't be made, there is no legitimate justification for government to create a monopoly that prohibits interstate commerce and competition.

(5) Competitive designation process

Federal flow control legislation should require that if the government seeks to flow control waste to a designated facility, it designate that facility pursuant to a competitive process. The process should assure that all interested public and private entities are afforded an opportunity to offer their existing or proposed facilities for designation, and to have them evaluated for selection based on their merits in meeting the goals and criteria for flow control articulated in the management plan adopted by the government.

(6) Grandfather provisions

Federal flow control legislation should "grandfather" existing flow control measures that have been implemented by designating existing or planned public or pri-

vate facilities to which waste or recyclables must be delivered. A pre-existing flow control measure involving any such facility should not be required to comply with (3), (4), or (5) above.

For similar reasons of fairness, grandfathering provisions should also be provided to facilities that were in existence prior to adoption of any new flow control measure and did not rely on flow control. Such provisions should protect contracts in effect prior to the adoption of the measure, and should include a phase in period for application of the flow control measure to spot (non-contract) waste.

(7) Effect on Out-of-State MSW

Federal flow control legislation should state that no State or local government may apply any authority that may be granted by the interstate MSW bill you recently ordered reported to ban or limit receipt of out-of-State MSW so as to prohibit receipt of such MSW by any facility in that government's jurisdiction that (a) has been issued a permit for waste management prior to adoption of a flow control measure, and (b) would be denied receipt of MSW generated within that jurisdiction because it was not designated to receive MSW by the flow control measure. There are at least two reasons to include this element. First, a government that designates a facility to receive waste and prohibits waste from going to non-designated existing, permitted facilities will have decided that those non-designated facilities are not needed to meet its MSW management responsibilities. The capacity to safely and lawfully manage MSW under permits at those facilities will have been considered "surplus". There is, therefore, no legitimate basis for denying those facilities the opportunity to utilize that surplus, permitted capacity in the interstate commerce market. Second, it is necessary to ensure that the authority to flow control MSW away from existing facilities may not be used to make a nullity of the protections for good faith existing interstate flows that you protected in the interstate bill. It should not, for example, be possible for a State to utilize flow control authority as a guise to ban out-of-State MSW by flow controlling all out-of-State waste away from an existing facility and thereby nullifying the right to import it that is given to that facility by the interstate bill.

WHY WE SUPPORT S. 2227

We support S. 2227 because it is substantially consistent with the position I outlined above. It is, in our view, an appropriate compromise that balances the need to protect through grandfathering existing investments and arrangements upon which there has been actual reliance, and the need to foster and maintain vigorous and free competition in the provision of waste management services. It does so by grandfathering flow control measures that have been implemented by designation of particular facilities before May 15, 1994, and authorizing prospective flow control after that date of only household MSW and relinquished recyclables under specified conditions and procedures, including a competitive process for designation and a finding that flow control is needed.

We are aware of some concern that some States may have fully developed and implemented flow control measures that already include findings of need and a competitive process that should not be subjected to prolonged Federal litigation under the requirements of S. 2227. To meet that concern, we would have no objection to a prompt and objective process for certification of the consistency of those measures with the requirements of the bill.

A second concern has arisen with respect to the direct grant of authority to qualified political subdivisions. We believe that the bill should not grant authority to flow control in a manner that would violate State law. In some States, for example, State law requires more competition and prohibits creation of monopolies in markets for certain goods or services.

We would welcome the opportunity to work with you and your staff on both of these matters.

OTHER SUGGESTED SOLUTIONS

Finally, let me comment on why we consider several other suggested resolutions of the flow control issue to be inadequate or unnecessary.

Do nothing

This serves no one's interests well. The current uncertainty about the state of existing flow control measures outside Clarkstown, N.Y. has a chilling effect on investments, contracts, and other business planning by the public and private sectors. Both sectors need to know what the rules are.

Grandfather only those measures necessary to pay debt on facilities or perform contracts

This fails to protect good faith reliance on flow control measures that are self-sustaining. It would also result in excessive and extensive litigation about whether the debt had been paid, whether refinancing to obtain lower rates was acceptable, and whether renewals of contracts were acceptable.

Grandfather all flow control measures "on the books"

This would protect hundreds, if not thousands, of measures that have never been implemented, and upon which there has been no reliance. Any jurisdiction that has adopted, but not implemented a flow control measure, should be presumed to have determined that unconstitutional flow control was not necessary to accomplish its objectives. No one has relied or made investments based on the flow control measure "on the books". Before implementing a flow control measure, the jurisdiction should comply with the requirements and safeguards of S. 2227.

Provide a 1-year or 2-year authorization for flow control

This only postpones the difficult decisions and leaves planners in the public and private sectors with insufficient confidence. No one is going to assume long-term debt or extend credit in flow-controlled or other facilities based upon a 1- or 2-year authorization to conduct activities that will be unconstitutional unless Congress re-authorizes the activities.

Do not require a competitive designation process for designations after May 15, 1994

This ignores the consensus we believe was achieved in our discussions with representatives of the public sector. Although there was not consensus about what portion of the waste stream should be flow-controlled, we believe there was agreement that new designations should be awarded pursuant to a competitive process. Doing so is consistent with, and warranted by a study by Apogee Research, Inc. entitled "Economics of Municipal Solid Waste Flow Controls". I would be grateful if it could be included in the record of this hearing for your careful consideration.

The Apogee report reviews both economic theory and experience with governmentally created monopolies. It concludes that:

Non-competitively awarded flow controls eliminate competition within the waste-shed by designating certain facilities as the exclusive repository to which all municipal solid waste in the jurisdiction must be taken. Empirical evidence demonstrates unequivocally that where such flow controls are designated *without periodic competitive bidding*, consumer prices and hence, monopoly profits, are high; incentives are lost to operate facilities efficiently; risks of financial performance escalate; technology innovation is undermined; and risks to public health and the environment increase. In short, society is worse off under flow controls than under a competitive market structure.

This suggested solution is also contrary to the approaches of both the Administration and Congress to health care reform, telecommunications reform, and assistance to the nations of the former Soviet Union, all of which are centered on promoting competition.

Don't authorize any prospective flow control of residential MSW or relinquished recyclables

This ignores the fact that thousands of communities throughout the United States participate successfully in public/private partnerships with the private sector for safe, environmentally protective, and cost-effective management of residential MSW and recyclables. WMI alone participates in nearly 1,800 such competitively awarded exclusive franchises or contract arrangements. We are not confident that those arrangements would be immune from a challenge under the *Carbone* decision. If so, then there may be no need for any Federal legislation; any State or local jurisdiction could simply obviate the Commerce Clause by contracting or franchising residential and commercial MSW and recyclables. If, however, such arrangements are potentially vulnerable, as we believe, then S. 2227 is warranted to protect existing arrangements, and to assure the availability of mutually beneficial, cost-effective arrangements in the future.

Authorize prospective flow control of commercial MSW

This ignores the fact that there is no need or historical tradition for flow control of commercial MSW. Local government has not and should not assume the responsibility or burden of managing commercial and industrial wastes except to the extent of regulations to protect human health and the environment. Enacted health and

environmental legislation and private sector services are fully adequate to manage these waste streams without additional government intervention. To do so would be analogous to local government directing McDonalds, or any other restaurant within its jurisdiction, to buy their food supplies from a specified vendor. It also ignores the fact that commercial MSW generators seek and deserve the opportunity to select the entities that will transport and dispose of their wastes in order to avoid liability for improper transport or disposal. Flow control of commercial MSW would preclude that selection without necessarily relieving them of liability.

Authorize broad, discretionary flow control to assure environmental protection, recycling, composting, and other mandated services

Advocates of this approach suggest that vesting government with broad, discretionary authority to impose flow control is essential for public health, environmental protection, and other mandated responsibilities. They are wrong for several reasons.

First, flow control is not an environmental issue, but an economic one. Flow control is *not* necessary to protect health or the environment. They are best protected through appropriate regulations such as the Resource Conservation and Recovery Act and the recently implemented Subtitle D regulations, provisions of the Clean Water and Clean Air Acts applicable to waste management facilities, and the numerous and extensive statutes and regulations governing solid wastes adopted by State government. As you know, MSW management facilities, including landfills and trash-to-energy facilities, are among the most heavily regulated facilities in the country. EPA's studies have ranked municipal solid waste landfills among the facilities with a low risk of harm to public health and the environment. Under currently implemented regulations, MSW can be transported, treated, and disposed at State-permitted facilities with no harm to health or the environment. Clearly, flow control is not a necessary prerequisite to protect public health or the environment. Indeed, at least one flow-controlled site (Central Landfill in Johnstown, Rhode Island) is a Superfund site listed in the National Priorities List.

Second, there are no Federal mandates to recycle, compost, combust or pursue any other particular waste management options that allegedly require flow control. Any such mandates are imposed by State and local laws. Those laws can, and often do require waste materials within a jurisdiction to be separated, processed, or disposed in a certain manner. In those cases, there will be a market to meet the demand created by the requirement, and flow control will not be necessary.

Finally, I should note that some advocates of this approach seek to view it as a public versus private sector confrontation. This is an unfair mischaracterization. I am confident that the private sector in general, and WMX in particular, are not intent on stripping local governments of their police powers nor excluding them from their traditional and important role in regulating the MSW generated within their boundaries. We have no objection to the public sector providing waste services themselves as owners/operators, so long as they enter the market and compete on equal terms with private sector providers of the same services. Moreover, in a very real sense, we believe flow control poses the same problems and requires the same approach whether the designated facility is owned by a public or private entity. We would find non-competitively awarded monopolies equally objectionable, regardless of the sector to which it is awarded.

That concludes my statement, Mr. Chairman. I will be pleased to answer any questions that you or Members of the subcommittee may wish to ask me.

STATEMENT OF THE AMERICAN FOREST & PAPER ASSOCIATION

The American Forest & Paper Association appreciates the opportunity to submit this statement for the hearing record on the issue of municipal solid waste flow control. AF&PA applauds the recent *Carbone* decision by the United States Supreme Court which basically stated that flow control ordinances are an unwarranted intrusion by localities into interstate commerce and are therefore unconstitutional. AF&PA understands the perception on the part of some that government regulation, particularly on the State and county levels, is necessary to deal with the problem of solid waste and solid waste disposal and that flow control requirements will, in some way increase recycling. After years of experience, however, we offer significant evidence, illustrated by the unprecedented expansion in U.S. paper recovery, that lower levels of government regulation and more reliance on the free market will in fact maximize the ability of our industry to recycle more recovered paper.

Recovered paper is a vital raw material source for the industry: last year, recovered paper supplied a third of the domestic industry's fiber—up from 25 percent just

5 years earlier. In the year 2000, recovered paper is expected to supply 40 percent of all the fiber used to make new paper and paperboard products. Therefore, it is imperative for the industry to have continued free market access to recovered paper.

The U.S. paper industry has a long and proud history of recycling leadership, with paper and paperboard already constituting over 60 percent of all post-consumer materials recovered for reuse. However, we recognize and accept our responsibility to do more, and that is why the industry has established an ambitious goal to recover—for recycling and reuse—one-half of all the paper Americans use in the year 2000. The new goal succeeds another voluntary goal the industry set 4 years ago to recover 40 percent of all paper used in 1995.

That goal has just been achieved—a full 2 years ahead of schedule. Based on the tremendous success of the 40 percent goal program, the continuation of a market-driven, recovery-based approach to recycling and reusing paper offers the most effective way to pursue the industry's objective: to maximize recycling and minimize the amount of paper that ends up in landfills.

The industry's commitment to recycling has made an extraordinary difference, and it has paved the way for an unprecedented expansion in U.S. paper recovery. Today:

Well over one of every two newspapers published is recovered and recycled—nearly twice the recovery rate in 1985.

The recovery of printing-writing papers continues to grow significantly. Between 1985 and 1993, tons recovered grew more than 90 percent—and growth in recovery will be even higher during the balance of the decade. More than 60 percent of all corrugated material used is recovered. And, with growing demand for OCC by domestic manufacturers, the challenge here is to recover even more.

The recovery of paper and paperboard packaging is at an all-time high. In fact, the most recent figures from the U.S. Environmental Protection Agency show that 37 percent of all paper and paperboard packaging used in this country is recovered—well over twice the rate of recovery of all other packaging combined.

Largely as a result of this growth in paper recovery, there have been significant changes in the way used paper is managed. For 6 consecutive years, the amount of paper sent to landfills has been reduced.

In 1987, 47 million tons of paper and paperboard were buried in landfills—roughly twice the amount recovered for recycling.

In 1993, 35.6 million tons of paper went to landfills—11 million fewer tons than in 1987, despite a 10 million ton increase in domestic paper consumption.

And, last year, for the first time in history, more paper was recovered in this country for recycling and reuse than was buried in landfills.

Progress in paper recycling has been achieved through market forces, as the availability of increasing supplies of recovered paper has provided tremendous opportunities for U.S. manufacturers to increase recycling capacity. In recent years, despite a major

economic recession that has cut deeply into profits, companies have still invested several billion dollars toward that end—and, the results are impressive.

Since 1985, consumption of recovered paper at U.S. mills has jumped more than 12 million tons—a 76 percent increase.

Recovered-paper consumption at U.S. mills continues to grow at three times the rate of growth of total production capacity—by any measure, a significant change in raw-material sourcing.

Today, well over 400 domestic paper mills recycle some recovered paper, and about 200 depend entirely on it for their raw material requirements. Almost

without exception, U.S. paper companies are using at least some percentage of recovered paper for their fiber.

Clearly, tremendous progress has been made during this decade in increasing paper

recovery and recycling—and in reducing the amount of paper disposed of in landfills. Much of the industry's current success—and, more importantly, its future growth—in recycling is dependent upon unfettered access in the marketplace to the necessary volume, quality and diversity of this raw material. As with other commodities, the economics of supply and demand are crucial factors, and government flow control policies which prohibit or restrict the industry's ability to obtain the right amount and type of raw material jeopardize the past and future investment in paper recycling.

The paper industry's position on flow control is founded on two core principles. First, recovered materials are not solid waste. Recovered paper—received from residential and commercial collection programs across the nation—is the source of one-third of the paper industry's raw material. These materials are commodities, bought

and sold on the open market like thousands of other commodities. They are not solid waste and should not be regulated as such. If paper does not enter, or is diverted or removed from the solid waste stream, it becomes a commodity raw material and should not be regulated as a solid waste. The paper industry supports policies that ensure manufacturers access to their raw material before it is discarded to the solid waste stream or when it is diverted from the stream prior to disposal.

Second, since recovered materials are commodities, the personal property rights of their owner are to be protected. As items of personal property, recovered materials are not subject to flow control restrictions. Ownership of recovered materials is maintained by the owner until definitive action is taken by the owner to voluntarily relinquish such ownership to other parties. The government should not mandate that recovered materials be involuntarily transferred to the government or its recycling agent. Once the owner/generator voluntarily transfers ownership by placing the materials for public collection either at the curb or other designated location, the government can assume ownership and has the authority to direct their disposition.

The industry believes local economic conditions, not laws or regulations should be allowed to dictate the flow, price and quality of commodities. The validity of this approach is apparent from the tremendous size and growth of the paper recycling industry outlined above. This growth occurred, and continues, only because paper recycling mills have unrestricted access to their raw materials. Any attempts to block or restrict such access, through a variety of flow control channels, could have a crippling impact on the industry's recycling and reuse efforts. Flow control of recovered paper will provide a disincentive to the future expansion of paper recycling mill capacity and could restrain future recycling efforts.

Without free and unencumbered access to a continuing supply of recovered paper, the paper industry truly believes that achievement of the industry's goal to recover 50 percent of the paper consumed in the United States will be severely jeopardized. The American Forest & Paper Association would hope that these views—the views of those who have made and will continue to make the investments necessary to make recycling work—are considered as the subcommittee considers the complicated and many-faceted issue of flow control.



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

P. O. Box 2063
Harrisburg, PA 17105-2063
July 15, 1994

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Office of Air & Waste Management

(717) 772-2724

Senator Frank R. Lautenberg, Chair
Subcommittee on Superfund, Recycling
and Solid Waste Management
506 Hart Senate Office Building
Washington, D.C. 20510-3002

Dear Senator Lautenberg:

I would like to enter the enclosed testimony of the Pennsylvania Department of Environmental Resources into the record on the hearing held July 13, 1994, on S.2227 by the Senate Subcommittee on Superfund, Recycling and Solid Waste Management.

.If your subcommittee needs any further information on the importance of flow control or clarification of this testimony, please do not hesitate to call me.

Sincerely,

Catherine Cowan

Catherine W. Cowan
Deputy Secretary for
Air & Waste Management

Enclosure

CWC/RJH/pjd

STATEMENT OF ARTHUR A. DAVIS, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

The Pennsylvania Department of Environmental Resources strongly urges Congress to pass legislation authorizing States and local governments to use flow control. Contrary to industry assertions, flow control is not monopolistic regulation resulting in higher costs and inefficient facilities. Flow control protects human health and the environment. Flow control enhances recycling and source reduction. Flow control allows for adequate, planned, managed, environmentally protective capacity. We do not recommend that Congress mandate the use of flow control, only that Congress expressly authorize what Congress and US EPA have suggested in the past and validate those decisions States and local governments made trying to implement the public policy articulated in RCRA.

A key goal in a comprehensive waste management plan is the assurance that localities will have an environmentally responsible facility ready, willing and able to take their waste, both next week and next year, at an affordable and predictable price. Governments, State and local, who are responsible for managing municipal waste must provide for this service in times of disposal capacity scarcity and in times of disposal capacity glut. The waste disposal market is cyclical. Until we attain this goal of predictability, affordability and environmental responsibility, the garbage crisis remains.

Flow control, which in its broadest definition allows government to decide where its waste will be disposed of for a long period of time either through contract, licensing or by ordinance, is an important tool used by governments to obtain this goal. Flow control allows local governments to select and designate what landfills or incinerators will receive their waste rather than allowing a hauler to make that determination. The use of flow control helps local governments to fulfill their obligation to manage waste. Flow control is sometimes necessary to secure financing to construct a landfill or to provide a county with sufficient bargaining strength to negotiate a long-term disposal contract with a private facility. For example, in Pennsylvania there are 23 facilities that have amassed approximately \$¾ billion of bonding debt which is supported by flow control. Flow control benefits both public and private interests. Utilized haphazardly or arbitrarily, flow control can be unfair. But anchored in principles of fairness and openness, it can be an effective blend of free market competition with governmental regulation.

Traditionally, waste disposal decisions have been made by municipal governments; waste disposal as a function of government is not novel. Waste management services like the collection, transportation and disposal of waste either directly or through contract are part of the traditional infrastructure that municipal governments provide. The United States Supreme Court recognized the authority of municipalities to manage waste disposal in *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905). In *California Reduction*, the Court upheld the award of a franchise to collect waste and incinerate it in one facility. This is the earliest flow control mechanism upheld by our highest court.

The latest flow control mechanism reviewed by the Court was not similarly endorsed. The Court, in its May 16, 1994, decision in *C&A Carbone v. Town of Clarkstown, NY*, —, US —, 114 S.Ct. 1677 (1994), struck down a local waste flow control ordinance as contrary to the Commerce Clause of the United States Constitution. The Clarkstown ordinance required all municipal waste generated or processed in Clarkstown to be handled at the local privately operated transfer facility, then shipped for disposal. No public bidding or rational vendor selection process appears to have preceded the selection of this facility. The Court sharply rebuked Clarkstown for creating a monopoly by ordinance without an appropriate justification or bidding process.

Fortunately, flow control is not synonymous with the closed and arbitrary process reviewed in the *Carbone* case. For example, Pennsylvania's flow control system is based on an open bidding/competitive selection system. It is premised on a hybrid of the free market. Pennsylvania's system takes into account that the waste disposal market is cyclical, not stable, by allowing managed competition. Under Pennsylvania law, each of the 67 counties must develop and implement a ten year municipal waste management plan that selects and designates waste management facilities in

a fair, open and competitive process based upon criteria laid out in the statute.¹ Designated sites will be used for all of the municipal waste generated in a county for 10 years. Both public and private, in-State and out-of-State interests can compete for designation during the planning period. The planning process is democratic. A county plan is subject to the political approval of the county commissioners and ratification by more than fifty percent of the municipalities (representing more than fifty percent of the population) located in the county.

The power to flow control waste to designated facilities was granted to county governments as a means to secure the guarantee of ten-year waste capacity. This may not be the sole method that could have been used. However it allowed communities to make local decisions about community wide issues and to exercise choice over the types of waste-management options authorized under RCRA. Pennsylvania believes that the fair, open and competitive component of its planning process distinguishes it from the Clarkstown facts. Recent decisions in the wake of *Carbone*, however, illustrate the need for Congress to authorize local regulation of the flow of waste.

On June 30, 1994, the Pennsylvania Commonwealth Court issued an opinion in *Empire Sanitary Landfill, Inc., et al v. Commonwealth of Pennsylvania, et al.*, No. 265 M.D. 1992. The Court held unconstitutional an ordinance of Lehigh County implementing its municipal waste management plan by requiring that municipal waste generated in the county be disposed of in accordance with the plan. The plan identified particular private landfills, all in-State, which could exclusively receive the waste. The court held that the burden on interstate commerce from preventing out-of-State facilities from competing for the county's waste was not outweighed by the putative local benefit of capacity assurance and the ordinance therefore violated the Commerce Clause of the United States Constitution. As of July 11, 1994, this decision is the only State appellate court decision decided since *Carbone*.

The U.S. District Court for the Middle District of Pennsylvania held on June 24, 1994 that three counties' flow control policy must be judged under a strict scrutiny test and to survive must establish that flow control is the only means now available for meeting the counties' legitimate interest in providing adequate long-term waste disposal capacity for their communities. *Southcentral Pennsylvania Waste Haulers Association v. Bedford-Fulton-Huntingdon Solid Waste Authority*. Opinion issued Civil Action No. 1:CV-93-1318. The counties' policy provides that all municipal waste generated or collected within the three counties be flow controlled to the facility owned by an authority established by the three counties. The Court rejected the argument that RCRA constitutes an implicit Congressional authorization of the County's flow control policy.

Several Federal district court cases have reached similar conclusions in early procedural determinations. The trend in these cases appears to be hostile toward government and government's efforts to respond to solid waste issues. Many local governments built capacity when very little existed in the market. Unless these local governments can demonstrate that no other reasonable alternative is now available—a very difficult burden—it is likely that many flow control mechanisms across the country will be struck down.

In her concurring opinion on *Carbone*, Justice O'Connor specifically discussed Congressional authorization of flow control. Justice O'Connor found that the argument that Congress had authorized flow control in RCRA to be substantial. She reviewed carefully three provisions in RCRA and one House Report which stated that "This prohibition [on State or local laws prohibiting long-term contracts] is not to be construed to affect State planning which may require all discarded materials to be transported to a particular location. . . ." However she noted that none of these met the explicit authorization standard required by the Supreme Court's dormant Com-

¹The Pennsylvania legislature enacted, in July 1988, the Municipal Waste, Recycling and Waste Reduction Act, 53 P.S. §4000.101 *et seq.* ("Act 101"). The Pennsylvania legislature found it necessary to plan and conserve the availability of adequate disposal capacity—declaring that: (1) Improper municipal waste practices create public health hazards, environmental pollution and economic loss, and cause irreparable harm to the public health, safety and welfare. (2) Parts of this Commonwealth have inadequate and rapidly diminishing processing and disposal capacity for municipal waste. (3) Virtually every county in this Commonwealth will have to replace existing municipal waste processing and disposal facilities over the next decade. (4) Needed additional municipal waste processing and disposal facilities have not been developed in a timely manner because of diffused responsibility for municipal waste planning, processing and disposal among numerous and overlapping units of local government. (5) It is necessary to give counties the primary responsibility to plan for the processing and disposal of municipal waste generated within their boundaries to ensure the timely development of needed processing and disposal facilities. 53 P.S. §4000. 102(a).

merce Clause decisions. Any authorization must be "unmistakably clear" before the Court will conclude that Congress in fact permitted a State regulation that would otherwise be unconstitutional. Justice O'Connor carefully explained how Congress could authorize flow control and that the Court would defer to legislative judgment on this issue.

We believe that Congress should accept Justice O'Connor's invitation. Congress should act now to give courts clear direction that it has authorized the use of flow control so that municipalities can use this tool without fear of continuing to face costly court challenges. Without Congressional assistance, these obstructions to the effective functioning of government will continue.

If Congress accepts this invitation, any authorization to flow control municipal waste should not conflict with Congressional authorization of States to place reasonable limits on the amount of waste shipped interstate. Communities should make decisions about how to manage the waste they generate, however, that decision should not be imposed on unwilling recipient communities. The interstate waste legislation Congress is debating now should ensure that only communities willing to take waste from outside its State borders will receive waste. Flow control legislation should not interfere with the balance that has been struck in interstate waste legislation.

Additionally, any Federal flow control authorization should include an authorization to flow control municipal waste from commercial sources. Some facilities used for flow control as a necessary means to obtain financing. Other resource recovery facilities need to remain in operation continuously with a minimum quantity of waste. Municipal waste from commercial sources represents a large portion of the municipal waste stream. Both of these types of facilities' ability to operate will be significantly compromised without receiving municipal waste from commercial sources.

Congress should carefully craft the recyclable materials exclusion to the definition of municipal waste adopted for flow control. If this exception does not require that the materials must be recycled, then materials which are really wastes may avoid the flow control disposal limitations. Pennsylvania does not believe that recycling efforts should be subject to flow control authority. Recycling should not, however, provide an avenue to escape regulation under the flow control or interstate waste authorizations.

Congress is the appropriate branch of government to resolve flow control disputes. One of the problems facing government in the judicial challenges to flow control is the judicial refusal to understand the entirely different waste market that existed when many of these decisions were made from the market that exists today. In the 1980s, Pennsylvania faced a rapidly growing shortage of capacity for disposal of municipal waste. In the early 1970s, there were over 1,100 municipal waste landfills in Pennsylvania. By 1987, however, as a result of enforcement actions by Pennsylvania to close substandard and leaking landfills, the number of landfills available for disposal of municipal waste was reduced to 90. Not only was capacity for disposal of municipal waste shrinking rapidly, at the same time, the volume of municipal waste generated within Pennsylvania was increasing.

As a result of this growing landfill capacity shortage, municipalities and waste haulers during the mid to late 1980s sometimes had difficulty locating a landfill or other facility to dispose of municipal waste that they were generating or collecting. "Tipping fees"—the fees to dispose of waste at a landfill—increased dramatically between 1985 and 1989. Average tipping fees in the Southcentral region of the State more than tripled during that time. During this same period, landfills were generally unwilling to enter into long-term contracts for disposal of municipal waste.

In response to the waste disposal capacity shortage in the 1980s, the Pennsylvania legislature believed it to be critical for counties and regions of Pennsylvania to engage in long-term planning to assure the existence of adequate capacity for disposal of municipal waste. Long-term planning was and is essential to responsible and environmentally sound management of municipal waste collection and disposal. The General Assembly enacted Act 101 to achieve this legitimate goal. In so doing, the General Assembly made a conscious legislative judgment that flow control was necessary for responsible planning and management to occur.

Act 101 was intended to change the historical practice of reliance on short-term arrangements in an inherently fluctuating market for disposal services and to substitute in their place long-term waste disposal arrangements. The system created by Pennsylvania is a more reliable approach than a volatile spot market system. The long-term waste management arrangements contemplated by Pennsylvania included both long-term contracts with private facilities and the development of publicly owned facilities. While Pennsylvania did not promote either private facilities or

publicly owned facilities, neither did Pennsylvania want to preclude the development of publicly owned facilities.

Flow control does not restrict competition any more than long term contracts restrict competition. Flow control is a necessary waste management planning tool. If at the time this tool is employed, the same opportunity to compete is afforded to both in-State and out-of-State, public and private entities and the decision-making process is fair, then the use of this tool should be no different from entering into the long-term contracts contemplated by Congress. It should be within the power of municipalities and counties to make decisions about how waste from their communities will be managed. The flow control system used in Pennsylvania promotes competition, planning and stability of markets. It needs Federal support. Congress should authorize States and local governments to use flow control.

STATEMENT OF HON. HARRY STOKES, COMMISSIONER, ADAMS COUNTY, PENNSYLVANIA

I am pleased to be able to present this testimony to the Senate Environment and Public Works Committee. This testimony will elaborate on and place in greater relief points made to members of this committee by me in letters dated June 10 and July 6 of this year, to which I would ask you to refer.

I am a county commissioner from Adams County, Pennsylvania. This testimony is offered on behalf of the Board of Commissioners of Adams County, and is the official position of the Board of Adams County. This position is developed from and is consistent with conclusions derived in a county planning document known as our "ACT 101 Solid Waste Management Plan" (pursuant to Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act of 1988) which was ratified by the municipalities and citizens of our county in 1990, and overwhelmingly ratified again, with amendments, in April of this year, again by the municipalities and citizens of our county.

I have served as a county commissioner for 4 years. Prior to that I served as Gettysburg Borough Councilman for 2 years, and council president for 4 years. I have served in local government for over 10 years. I am a board member of the Adams County Conservation District, chairman of the Capital Area Resource Conservation and Development Council, one of eight such councils in Pennsylvania, and a member of several state-wide boards, including the Pennsylvania Agricultural Land Preservation Board. My background and education is in resource management.

Adams County is a relatively small, rural county in south central Pennsylvania, situated on the Mason Dixon Line 78 miles north of Washington, DC. It is 535 square miles in area and has a population of 80,000 people. It is one of the fastest growing counties in Pennsylvania, growing about 2.4 percent per year. It is an important farm county, not only to the State, but the nation. In addition to being an important producer of dairy, poultry and field crops, it is the largest producer of apples, peaches and cherries in the State, and the third largest in the nation. Its county seat is Gettysburg, where the Civil War battlefield is located. While Gettysburg receives approximately 1.5 million visitors a year, making tourism an important industry, fruit processing is the largest industry in the county, with Knouse Foods (Musselman) and Cadbury Beverages being the largest employers.

Adams County, and other Pennsylvania counties with which we have spoken, desire to implement local flow control ordinances for the best of reasons. These include:

- a) promotion of the health, safety and welfare of our citizens;
- b) promotion of the cleanliness of our environment, particularly our local environment;
- c) promotion of the efficiency of our waste collection, hauling and disposal systems;
- d) promotion of recycling and "beneficial reuse";
- e) promoting of competition in the marketplace, particularly as regards waste collection and hauling, but also as regards waste disposal.

None of these reasons has to do with a desire on the part of local governments to restrain local or interstate commerce or to create monopolies in waste handling or waste disposal. On the contrary, when properly applied, flow control ordinances can actually promote competition in the marketplace.

In a growing number of instances, and certainly in the case of Adams County, as waste handling and disposal become more highly regulated by State and Federal law, and more expensive to undertake as a business, local flow control ordinances become increasingly necessary for the promotion of goals (a) through (e), above, and

not simply a matter of convenience for or expediency on the part of local governments that wish to resort to these ordinances. For example, a flow control ordinance may be a necessary part of a county's integrated waste management strategy designed to remedy a particularly stubborn, harmful or costly problem, such as illegal dumping off roadsides in rural areas, or the inability of municipal sewage plants to find affordable disposal sites for sewage sludge when permits for land application are unattainable.

Many, indeed most counties will use the right to flow control their waste, particularly their municipal waste, not to protect a county-owned disposal facility, but to implement an integrated waste management system, that assures the proper handling of such waste from "cradle to grave." (Municipal waste is defined as residential, commercial, institutional or municipal garbage, in a solid, semi-solid or liquid form, and includes municipal sludge and septic tank pumpings not classed as hazardous or residual waste.) Without flow control it is extremely difficult to track waste, and there is virtually no way to tell what is being done with it or where it is going. Thus, whether or not a county owns a disposal facility, it needs to have the right to flow control its municipal waste.

The right of local governments to flow control has been viewed by some—and this belief has been strengthened by recent court decisions—as a means for local governments to "prop up" or protect in the marketplace costly publicly owned disposal facilities, such as a landfill or a "waste-to-energy" incinerator. Some environmental groups which oppose the incineration of waste may also, for that reason, oppose the right of local governments to flow control, under the premise that, without flow control, local governments cannot afford to build, or continue to operate, these expensive waste-to-energy incinerators.

But most counties and municipalities will *never* build, own, or operate an expensive landfill or incinerator, with or without flow control, simply because neither they nor their citizens can afford to do so. Flow control should not be denied to these local governments simply on the basis that others must be punished or their actions curtailed because they erred in the way in which they provided for the disposal of municipal waste in their jurisdictions. Stated as simply as possible, municipal landfills or incinerators that exist by virtue of elevated tip fees protected by a local flow control ordinance do not provide a good reason for failing to grant to local governments the right to flow control their waste. Thus, in the wake of the Supreme Court's *C&A Carbone v. Town of Clarkstown* decision, the Environment and Public Works Committee, the Senate, and Congress should not fail to return to local government, to counties and municipalities, the clear and unambiguous right to flow control their waste, particularly municipal waste, generated within their boundary.

A new approach to municipal waste disposal has emerged in just the past few years, which, I believe, has provided, or will provide, to local governments (and to the waste disposal industry, if it is interested) an important alternative to landfilling or incineration. That approach is solid waste composting, or "co-composting," when it includes the composting of sewage sludge and "septage" (septic tank pumpings) with solid waste.

Solid waste composting has been under development in the United States at least since the early 1970s. Meanwhile, it has also been under development in Europe, perhaps with earlier successes. In this country, as it moved from the pilot stage to full-scale application during the last decade, there were some notable failures, which set the U.S. composting industry back. However, in just the past several years, there have been one or more applications of composting technology in the United States that have survived the test of full-scale operation and have shown us that composting is a viable alternative for the management of municipal solid waste. The solid waste composting industry is now out of its infancy in this country, and, if given the opportunity, will see wide-spread application during the next decade.

Three important attributes of solid waste composting or co-composting are that: 1) the processes that have emerged are simple and quite well-understood; 2) these processes lend themselves well to small-scale applications (50 to 150 tons per day); and 3) the applications of these processes are relatively inexpensive to build. These three attributes make solid waste composting especially interesting to local governments. If local governments are given the ability by Congress to manage their solid waste streams, to wit, the right to flow control, I believe we will see many successful solid waste composting plants built in the next decade, particularly smaller scale plants in rural counties, built by city or county governments. Local governments, not private industry, will provide the capital to build these plants.

As a corollary to this, without flow control, local governments will hesitate to become involved in such projects, and the solid waste composting industry will be

much slower to develop, and will be likely to develop in a somewhat different and possibly less successful fashion. I say this because of my belief that solid waste composting is particularly well-suited to small-scale, "low-tech" applications that may be of little interest to the dominant companies in the waste disposal industry (Waste Management, Browning Ferris, Laidlaw, Chambers, etc.) for years to come, certainly as long as the advantage for these large companies resides in the merchandizing of a limited amount of landfill space, the availability of which and thus the market for which is controlled by those companies that can afford to go through the difficult process of permitting and building new landfills.

Because of the difficulty and expense, landfills are becoming larger and larger, evolving into regional, not local facilities. As a consequence, hauling of trash long distances is becoming a more important part of the landfill business. All the large companies have developed collecting and hauling arms which compete with the smaller, usually localized, independent hauler. Thus we see in this sector of the industry the same inexorable trend to consolidation that we have seen in the disposal end of the business. The construction of numerous small-scale composting plants, which could be serviced by small, independent haulers, would obviously go against this trend to consolidation, surely not to the satisfactions of the dominant companies.

Allow me to return to my previous statement regarding the reasons why Adams County wishes to implement a local flow control ordinance. I listed as reasons five management objectives. I would like to use the specific conditions that prevail in Adams County to illustrate the relationship between flow control and these management objectives.

(a) Promotion of the health, safety and welfare of our citizens

As it happens, four Superfund sites are located in Adams County. One of those sites is a closed landfill that accepted large quantities of out-of-State waste, as well as county-generated waste. Adams County also had another significantly sized landfill (small by today's standard) that is now closed, which we are watching with apprehension as we begin to receive complaints of well contamination in the area.

Today there are no active landfills in Adams County. Household waste must be transported on average 50 miles or more in order to be disposed of properly. In times gone by, residents in rural areas made a weekly trip with their pickup truck to dispose of their waste at the local landfill. Now, of course, that is not practical, nor is it permitted for an individual to dump at the regional landfill. Few small, local haulers service the rural areas because of the distance to the landfills. Collection services are now available to our rural residents only through the landfill companies, and these services are expensive. As a result, there is a great deal of illegal dumping occurring on our farms and off our roadsides in our rural areas. It is extremely difficult to catch those who are guilty of this illegal dumping.

Regional landfills also mean less frequent pick-ups in our urban areas, particularly of our commercial and institutional garbage. The trend is to larger dumpsters and less frequent pick-ups, creating very significant health hazards because of the putrefying garbage, and safety hazards, particularly for children, because of the unwieldy size and weight of the dumpsters.

Flow control allows local government to put into place a waste-tracking system whereby garbage is manifested as it is picked up and as it is disposed of. Ultimately, flow control allows local government either to direct its garbage to a particular disposal facility when there is a compelling need to do so, or to construct its own facility when the right kind of service, or an adequate level of service, is not available in the community.

Let me return to the matter of waste tracking or manifesting, which is the underpinning of any good waste management system. Manifesting encourages waste haulers to establish consistent and well-defined routes that do not vary, in order to promote the ease of record keeping. The local government official is able to review the manifests from week to week and month to month. The numbers reported on the manifest establish a reliable norm. A lack of consistency in these numbers immediately indicates to the official a potential for irregularity. The weights taken at the tip site provide an independent confirmation of the number of customers serviced on the route. Average figures generated on a regional or national basis also provide an independent check. With waste flow control, the local government official knows exactly who is picking up the garbage in each service area, at each address, and where that garbage is going. The official also knows which addresses and which areas do not have garbage service. This entire process, which is based on the ability of local governments to flow control, creates the basis for being able to track the currently untrackable waste that is now being illegally dumped.

(b) Promotion of the cleanliness of our environment, particularly our local environment

Once flow control and waste manifesting are put into place, the next logical step for local government is to institute a mandatory collection ordinance, certainly for all commercial and institutional waste, as well as for residential waste. This will go further than any other step to capture the waste now being improperly disposed of. Enforcement of a mandatory collection ordinance without waste flow control and manifesting would be all but impossible.

The enactment of a mandatory collection ordinance in a rural, farm county is a difficult and controversial step for county commissioners to take. But as rural counties grow, and farmers experience increasing problems with roadside litter and illegal dumping, such a step will be easier to take. It is likely that Adams County will take this step soon, providing its right to flow control is preserved. Inevitably, growth counties across the nation will take the same step as impacts from illegal dumping increase.

(c) Promotion of the efficiency of our waste collection, hauling and disposal systems

There are some immediate benefits that accrue to the responsible citizen when a mandatory collection ordinance is enacted. The cost of refuse collection may be spread over a larger rate-payer base. This causes the rates of those who have been paying for refuse collection to go down. Moreover, the ratepayer is less likely to pay through local taxes the cost of expensive cleanups of illegal dump sites in his or her municipality. A system of exonerations for those households which produce no trash, recycle everything, or produce so small a quantity as to justify joining with their neighbor can also be put into place to make mandatory collection less onerous.

With mandatory collection, rural routes become more efficient to service, because the garbage truck now stops at every mailbox, rather than at just a few. This also brings the unit cost of service down. I believe this will encourage the return of small, local haulers to the marketplace, who will be available to service their neighbors, not with a pickup truck of course, but with a small compactor truck.

Local governments can build on the waste flow, waste manifesting, and mandatory collection steps by establishing service areas which will be made available to refuse collectors on the basis of a competitive bid. This may be especially useful in urban areas. In Gettysburg we have the trucks of three different regional landfill companies running up and down the same small alleyways on different days of the week picking up cans here and there. As a result, householders do not know when to put their cans—or their “blue bins” of recycling—out, so that cans and blue bins are always left out, creating both nuisance and litter. Obviously, efficiency can be achieved by creating rural service areas as well, although competition for the provision of service in rural areas is less intense.

Creation of service areas that are competitively bid can be accomplished without waste flow control. In fact, service area bidding can create the equivalent of flow control, particularly when those companies that are bidding for a service area are associated with a particular landfill. But the ease of monitoring waste flow is enhanced by the establishment of service areas, which must be bid. Therefore, waste flow control can encourage competitive bidding.

(d) Promotion of recycling and “beneficial reuse”

Federal government, State government and society in general expect us to recycle a significant portion of our garbage, and they expect, indeed have mandated, local government to make this happen. Pennsylvania’s Municipal Waste Planning, Recycling and Waste Reduction Act required Gettysburg Borough to begin recycling in September, 1991, and requires all municipalities to make substantial progress toward achieving the goal of 25 percent recycling by January 1, 1997.

In order to assist local governments to pay for this, Pennsylvania placed a \$2 per ton fee on waste going into landfills and resource recovery facilities. This was a laudatory action, appreciated by local governments, but it must be recognized that any fee levied that results in higher tip fees at the landfill inevitably results in more garbage, particularly residential garbage, being diverted from the landfill and dumped illegally.

Gettysburg Borough instituted recycling in the following way. It licensed garbage collection in the Borough and required of each company that it provide a curbside recycling pickup service. The Borough enacted an ordinance requiring its citizens to recycle, and provided plastic recycling bins, “blue bins,” to each household free of charge, paid for by a grant from the State funded by the \$2 surcharge on tip fees.

As stated previously, three regional landfill companies provide garbage collection to Gettysburg. To pay for the curbside collection of recyclables, one of the compa-

nies, Waste Management, Inc., promptly instituted a \$6 surcharge on its normal collection fee.

The rates charged by the other companies soon matched those of Waste Management, within several dollars. Interestingly enough, we noted that Waste Management also increased their rates throughout the county to accord with the new rate in Gettysburg, despite the fact that curbside recycling pickup was not being offered elsewhere.

The county's recycling coordinator, a county employee, has witnessed on a number of occasions the collection companies dumping blue bins of recyclables directly into their garbage trucks. The county has also received calls from concerned borough residents to this effect, corroborating that this is not an uncommon practice on the part of the collection companies, which desire to cut down on the expense of hauling, handling and disposing of the recyclables. One collection company hauls its recyclables to a distant Materials Recovery Facility (MRF), paying not only the cost of hauling, but also a hefty tip fee to leave its mixed recyclables at the MRF. This has created a powerful disincentive for this company to honor the blue bin recycling program that Gettysburg instituted, with every good intention. And so, at every turn, this company does its utmost to divert the contents of Gettysburg's blue bins from the recycling stream to its landfill. Unfortunately, it is virtually impossible for local government to police such violations.

Mindful that the State mandate to recycle was fast approaching, not only for the Borough but also the townships, Adams County began in 1991 to study solid waste processing and composting. In particular, Adams County wanted to look at centralized recycling (whether accomplished mechanically or by hand picking). But we were also interested in determining whether or not the clean organic fraction of the municipal solid waste stream, representing 65 percent of the waste stream, could be beneficially reused. We were also facing a crisis in the disposal of municipal sewage sludge and septic tank pumpings. Municipal plants were having difficulty finding permissible fields on which to apply their sludge. They were no longer willing to accept septic tank pumpings, and so septic haulers were illegally dumping their tanks at night. The responsible haulers who paid the high fees at the landfill or incinerator to dispose of their septage properly were complaining bitterly to the County.

In June of 1993 Adams County completed a study of municipal waste composting which concluded that savings could be realized over the current cost of collecting, hauling and disposing of Adams County waste at existing regional landfills by locating a composting or co-composting facility in Adams County. This co-composting facility would be publicly owned and financed.

The cost to build, operate and haul to the composting facility, expressed on a per ton basis, was estimated at \$84 to \$92, compared to \$81 to haul and tip at any of the regional landfills. But the cost of landfilling plus curbside recycling was determined to be \$102. After 5 years of operation, the savings from the composting option were more dramatic: landfilling without recycling—\$96; in-county processing and composting—\$91 to \$100; landfilling with recycling—\$121; incineration—\$125.

The blue bin recycling system in Gettysburg is estimated to obtain rates of from 8 percent to 15 percent recycling for Gettysburg. Given the numerous ways in which the system fails to operate effectively, recycling rates in Gettysburg probably do not reach 8 percent. It is expected that the co-composting facility will reduce the amount of waste landfilled or incinerated by up to 80 percent, with virtually all of the aluminum and bi-metal being recycled, and all of the organics being converted to a high quality compost.

Thus, by its 5th year of operation, the compost facility would obtain recycling or reuse rates of 60 to 80 percent, at a cost of up to \$100 per ton, while landfilling with curbside recycling would obtain a recycling rate of from 8 to 15 percent at a cost of \$121 per ton.

Despite the fact that our study showed that a municipal waste composting facility would be competitive in the existing marketplace, even as it achieved recycling rates well above what is now possible, Adams County cannot consider incurring the risk of building such a plant without the ability to guarantee a predictable daily tonnage of waste to that plant. Moreover, Adams County would certainly want to have in place a comprehensive waste management program that would include waste flow and waste tracking or manifesting. Without the ability to flow control its waste, neither the management program nor the composting facility are possible.

(e) Promotion of competition in the marketplace

Although Adams County would be creating a monopoly in the marketplace if it were to build a municipal waste composting plant, yet it would not be doing so by

the device of a flow control ordinance, but rather by the fact that the marketplace does not now provide this service, and is not likely to provide it, without local government intervention, for years to come. Thus our need to resort to a flow control ordinance to guarantee our ability to finance such a plant is not an infringement on the freedom of the marketplace.

Adams County would use a competitive bidding process to select a vendor to build and operate a municipal waste composting plant. The vendor would be required to perform a service for the County that is not now available in the marketplace, namely, to process up to 80 percent of the County's waste for recycling or beneficial reuse. (The possible exception to this is the York County incinerator which converts waste to energy. But the cost to Adams County to use the incinerator is substantially higher than the cost to compost its own wastes, with the additional consideration that no recycling is obtained with incineration.) Thus, Adams County, to obtain its desired objectives, cannot resort to the existing marketplace, even if it wanted to.

It is our belief that competition in collection and hauling services will be significantly enhanced by the construction of an in-county composting facility. As stated earlier, we have seen in this region that the collection and hauling divisions of the regional landfill companies have become dominant over the small, independent haulers. The reasons for this are not difficult to discern. The trucks of the landfill company unload at their own landfill "for free," or the assets of the transportation division are transferred to the landfill division, to be returned later. The independent hauler, in contrast, must pay real money to dump his truck at the landfill. The landfill manager may choose not to inspect loads dumped by his company's trucks. However, he may scrutinize the loads brought by the independent hauler, and reject any of them on the basis that some item found in a load, such as an unpainted table leg, is residual waste. By contrast, the requirement to haul to the county composting facility places all haulers on an equal footing.

Finally, it should be noted that the municipal waste composting facility proposed by Adams County is not, strictly speaking, a disposal facility, but rather a processing facility. The residue that is left after organics in the waste stream are composted and the valuable recyclables are pulled out, that residue being 20 percent more or less, will have to be disposed of at a landfill or incinerator. Again, Adams County would use a competitive bidding process to select a disposal site for this residue. Thus, the ultimate flow of waste to a disposal site would be determined not by our right to flow control, but by the marketplace.

It is my pleasure to submit this testimony to the Senate Environment and Public Works Committee on behalf of Adams County. I hope the example of Adams County will be instructive to the Members of the committee as they deliberate the matter of waste flow control, a topic of considerable interest and import to local governments, which are the ultimate managers of our nation's municipal waste stream.

Thank you.

STATEMENT OF LEWIS D. ANDREWS, PRESIDENT, GLASS PACKAGING INSTITUTE

On behalf of the Glass Packaging Institute, I thank you for the opportunity to offer our comments on the issue of flow control.

It is clear that a great deal of time and effort has been spent on this issue. We appreciate your efforts, as we recognize the importance of careful solid waste management in the 1990s and beyond. We believe that the inclusion of recyclables in flow control will be detrimental to our industry and its proven recycling efforts.

Flow Control Threatens Quality of Recyclables

As a major consumer of recycled materials (approximately 2.5 million tons of recycled glass, or cullet, in 1993) our industry plays a key role in the continued success of community recycling efforts throughout the country.

The glass container industry applies the same quality standards to cullet as it does to virgin raw materials. Cullet, like virgin raw materials is a feedstock to the glass production process; as such, it must meet the same rigid quality standards. Cullet must be color sorted and contaminant free.

Competition in the marketplace assures the availability of high quality recyclable materials. Typically, glass container plants buy the highest quality cullet from one of any number of competing cullet recycling facilities. Competition between recycling facilities produces high quality recyclables because we, as the end user, have the option of choosing between multiple suppliers.

Flow control of recyclables, including curbside collection, (our largest source of cullet) to designated recycling facilities will significantly reduce or possibly eliminate the incentive of market competition. Without competition, the supply of high

quality cullet that has enabled us to consistently increase the recycled content of our products will be jeopardized.

Maintaining Quality With Flow Control

If municipalities are allowed to flow control their recyclables, they should require designated facilities, in the lack of market competition, to produce cullet that meets industry quality requirements. This can be achieved through clearly defined processing goals.

A goal that seventy-five to eighty percent of the glass packaging, collected and processed by a recycling facility, meet the industry's quality requirements, would guarantee our industry a consistent source of quality cullet. The remainder of the collected and processed cullet should be sold to secondary markets i.e. fiberglass insulation or construction aggregate, so as to avoid landfill disposal.

To reach this goal, procedures for handling materials would need to be established and adhered to by recycling facilities and haulers. The Glass Packaging Institute would be happy to serve in an advisory capacity in establishing handling practices.

If recycling facilities produce large volumes of quality cullet it will encourage its reuse, and will foster a closed-loop recycling system in which a glass container is recycled over and over again. It would also help solve many of our quality problems, as there are too many recycling facilities throughout the country where high percentages of glass packaging and other recyclables must be landfilled, due to poor handling and contamination.

We believe our suggestions could easily be added to the designation process in which municipalities choose a flow controlled facility.

Competition Keeps Costs Down

Like quality, cost of a product is the result of competition in the market. Competition in the market not only increases quality but also reduces cost.

Flow controlling cullet to designated processing facilities that are not subject to the rigors of competition will result in needlessly expensive processing costs for cullet. This will undermine the ability of cullet to compete with virgin raw materials, and discourage its use in our production process.

Lower quality and higher priced cullet are a worst case scenario for glass recycling. This is especially true when one considers minimum recycled content laws. If post consumer glass packaging is flow controlled, it will be next to impossible to comply with minimum recycled content laws. There simply will not be enough high quality, affordable cullet available.

While we recognize that flow control potentially can serve a role in the future of waste management, we believe recyclables should be exempted unless requirements ensuring the continued production of low cost, high quality materials are included.

Thank you for the opportunity to comment on this important issue.



GREATER LEBANON REFUSE AUTHORITY

1610 Russell Road • Lebanon • Pennsylvania • 17046

Phone (717) 867-5790

Fax (717) 867-5798

July 13, 1994
File # 94-0211

Senator Frank R. Lautenberg

via fax # 202-224-9707

Subject: Testimony Regarding Flow Control of Municipal Solid Waste

Dear Senator Lautenberg:

Testimony of the Greater Lebanon Refuse Authority Follows:

A generic legislation providing authorization for local government to plan, control and manage municipal solid waste disposal for residential, institutional and commercial sources is necessary to continue to provide for this public service.

The Greater Lebanon Refuse Authority (GLRA) has managed municipal wastes for Lebanon County, Pennsylvania for the past thirty five years in an open, participative, and environmentally sound manner. This is evidenced by the receipt of the 1994 Landfill Excellence Award from the Solid Waste Association of America announced July 12, 1994. (See attached news release.)*

This issue is very important to GLRA since we currently have approximately fifteen million dollars in municipal bonds issued to pay for our waste management programs which were secured based on PA Act 101 and the Lebanon County Solid Waste Management Plan flow control regulations. GLRA has no taxing capability.

Flow control regulations are continually being challenged in the courts due to absence of clearly authorizing federal legislation for state and local government to regulate disposal of wastes within their borders. While the commerce clause, article 4 of the constitution, was invoked to overturn flow control in other areas, we believe that local government is required to provide waste disposal facilities and to manage these facilities for the public health and have been doing so since our incorporation as a municipal authority in 1959.

Approximately one half of GLRA's current tipping fee of \$53.64 per ton is needed to pay for environmental projects which protect the ground water quality under previously utilized landfills which served Lebanon County, Pennsylvania since 1959.

* The new release referred to has been retained in committee files.

The tipping fee at GLRA's facility without regulatory fees and environmental costs would be less than \$21.00 per ton, among the lowest published tipping fees in the nation. Current fees are about the state average at \$53.64 per ton.

Lebanon County Pennsylvania has had some form of control of municipal waste disposal to protect the public health since 1960, when the current site was selected by the Regional Planning Commission.

All townships, cities and boroughs in Lebanon County, Pennsylvania are represented members of the Greater Lebanon Refuse Authority,

GLRA, the Lebanon County Waste Management Plan and implementing regulations are not currently the subject of legal actions, nor do our regulations attempt to regulate other than wastes generated in Lebanon County, Pennsylvania, or presented for final disposal in Lebanon County, Pennsylvania which is different than the scenario in Carbone vs Clarkstown.

Outstanding debt on bonds issued to maintain environmental quality at previously used landfills at standards adequate to protect the public health and safety is paid as an integral fee by generators of waste for disposal in Lebanon County.

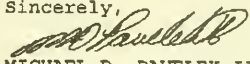
Monies spent for maintaining environmental quality are pledged to be repaid under a \$14,345,000 Solid Waste Revenue Bond, Series of 1992, which relies upon flow control for the source of revenue.

It is requested that federal legislation be enacted this session which: "Specifically permits the Greater Lebanon Refuse Authority, and other local governments, to exercise flow control over residential, commercial and institutional municipal wastes, as currently defined in Pennsylvania Code Chapter 25, or other states applicable regulations. As a minimum, these controls should be authorized until outstanding bond issues are paid.

This legislation would permit GLRA and others to continue to protect the public health and safety, prevent harm to our bond holders, and phase us into a "free market" environment when the bond is repaid without suffering an immediate penalty for undertaking environmental protection/improvement projects which are essentially charged to those who used the GLRA facilities. In addition, there is no evidence that this legislation would cause a loss of revenue or hardship on private sector operations since GLRA operates the only waste disposal facility in Lebanon County, Pennsylvania and all waste haulers are charged the same fees to use this facility.

On behalf of the 26 member municipalities of the Greater Lebanon Refuse Authority, assistance in securing legislation to clearly authorize our flow controls at the federal level as soon as possible will be greatly appreciated.

Sincerely,


MICHAEL D. PAVELEK II
Executive Director

cc: GLRA Members & Staff

Encl: SWANA News Release
Excerpt from 94 Refuse Report on Flow Control

JENSEN BAIRD GARDNER & HENRY

ATTORNEYS AT LAW

TEN FREE STREET

P.O. BOX 4510

PORTLAND, MAINE 04112

(207) 775-7271

TELECOPIER (207) 775-7935

RAYMOND E. JENSEN

M. DONALD GARDNER

MERTON G. HENRY

OF COUNSEL

KENNETH BAIRD

(1914 1987)

YORK COUNTY
OFFICE

419 ALFRED STREET

BIDDEFORD, MAINE 04005

(207) 282-5107

TELECOPIER (207) 282-8301

JOHN D. BRADFORD
WALTER E. WEBBER
DONALD A. KOPP
KENNETH M. COLE III
NICHOLAS S. NADZO
FRANK H. FRYE
DAVID J. JONES
MICHAEL A. NELSON
RALPH W. AUSTIN
JOAN LABRIQUE COOK
RONALD A. EPSTEIN
WILLIAM H. DALE
JOSEPH H. GROFF III
F. BRUCE SLEEPER
DEBORAH M. MANN
LESLIE E. LOWRY III
KEITH R. JACQUES

PATRICIA McDONOUGH CUNN
MICHAEL J. QUINLAN
ELIZABETH T. HIGH
JAMES N. KATSIAPICAS
PETER B. LAFONO
JOHN R. GOLDSBURY
MILOA A. CASTNER
EMILY A. BLOCH
ANNE H. JORDAN
SCOTT A. ROBERTSON
PETER J. WILEY
BARRY P. FERNALO
BERNADETTE A. BOLOUC
KAREN MCGEE HURLEY
SALLY J. GAGGETT
MATTHEW A. WOODWARD

July 22, 1994

Honorable Frank R. Lautenberg, Chairman
Senate Subcommittee on Superfund,
Recycling & Solid Waste Management
456 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

RE: Comments on S.2227

Dear Senator Lautenberg:

Enclosed for filing in the record of public comments on S.2227, A Bill "To amend the Solid Waste Disposal Act to Provide Congressional authorization of State control over transportation of municipal solid waste, and for other purposes," please find public comments submitted on behalf of: Governor of the State of Maine; Maine Waste Management Agency; Maine Municipal Association; Regional Waste Systems, Inc.; Mid-Maine Waste Action Corporation; and Municipal Review Committee, Inc.

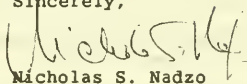
If the Subcommittee's members or staff should have any questions regarding these joint comments, those questions may be addressed to any of the persons whose names are listed at the end of the enclosed comments or to me.

JENSEN BAIRD GARDNER & HENRY

Honorable Frank R. Lautenberg
Page Two
July 22, 1994

Thank you for your consideration in this matter.

Sincerely,



Nicholas S. Nadzo

JNK/jb/932

Enclosure

cc: Honorable George J. Mitchell
Honorable William S. Cohen
Honorable Thomas Andrews
Honorable Olympia Snowe
Sherry Huber, Maine Waste Management Agency
Kenneth P. Young, Jr., Maine Municipal Association
Charles Foshay, Regional Waste Systems, Inc.
Neal Allen, Mid-Maine Waste Action Corporation
Don Meagher, Municipal Review Committee, Inc.
Lucinda White, Assistant Attorney General
Thomas Brown, Esq.

AMENDMENTS TO S.2227

1. Amend the bill in subsection (e), paragraph (1), subparagraph (B), at page 9, lines 1-3 as follows:

(B)(i) Any other contract or agreement entered into before May 15, 1994, for the management of municipal solid waste.

"(ii) Any law, ordinance, regulation, or legislative or administrative provision -

(I) that is adopted on or after May 15, 1994;

(II) that pertains to the transportation or disposal of municipal solid waste generated within the boundaries of a State or qualified political subdivision; and

(III) that is adopted by a State or qualified political subdivision that has entered into a contract or agreement referred to in paragraph (1)(B)(i) above.

2. Amend the bill in subsection (e), paragraph (1) at page 12, line 24, to add a new subparagraph (D):

"(D) Any amendment adopted on or after May 15, 1994, to a contract or agreement or to a law, ordinance, regulation, or legislative or administrative provision referred to in subparagraph (A), (B) or (C) of subsection (e)(1), or any renewal or extension, on or after May 15, 1994, of a contract or agreement referred to in subparagraph (A), (B) or (C) of subsection (e)(1).

3. Amend the bill in subsection (e), paragraph (4) at page 14, lines 1-15 as follows:

"(4) LIMITATION. -- A State or qualified political subdivision may exercise the authority of any law, ordinance, regulation, or provision described in paragraph (1)(C), to the extent provided in such paragraph, only if the State or qualified political subdivision develops and implements a process described in subsection (c) for the designation of any waste management facility or facility for recyclable materials that the State or qualified political subdivision designates, after the date of enactment of this section, as a facility to which any waste or materials described in paragraph (1) shall

be transported; provided however, that Nothing in this paragraph shall affect any designation made before the date of enactment of this section; and provided, further, that a State or qualified political subdivision which, before the date of enactment of this section, designated a solid waste management facility or facility for recyclable materials as a facility to which any waste or materials described in paragraph (1) shall be transported, may designate another waste management facility or facility for recyclable materials for the waste or materials described in paragraph (1) without regard to subsection (b).

4. Amend the bill in subsection (g) at page 19, line 11 to add a new paragraph (g)(6):

"(6) DISPOSAL, -- For purposes of this section, the term 'disposal' means resource recovery; resource conservation; and the collection, source separation, storage, transfer, processing, treatment or land filling of solid waste

JOINT STATEMENT OF THE GOVERNOR OF THE STATE OF MAINE, MAINE WASTE MANAGEMENT AGENCY, MAINE MUNICIPAL ASSOCIATION, REGIONAL WASTE SYSTEMS, INC., MID-MAINE WASTE ACTION CORPORATION, AND MUNICIPAL REVIEW COMMITTEE, INC.

These joint comments are submitted on behalf of the following entities in support of S. 2227 for inclusion in the record of the hearings by the United States Senate Subcommittee on Superfund, Recycling and Solid Waste Management of the Committee on Environment and Public Works:

- Governor of the State of Maine;
- Maine Waste Management Agency;
- Maine Municipal Association, representing the cities and towns of the State of Maine;
- Regional Waste Systems, Inc. ("RWS") and Mid-Maine Waste Management Corporation ("MMWAC"), non-profit, quasi-municipal corporations serving 31 and 12 Maine municipalities, respectively, each of which implements its integrated municipal solid waste management system through use of flow control ordinances (i.e., ordinances which designate a waste management facility for disposal of all waste generated in the municipality); and
- Municipal Review Committee, Inc. which represents 160 communities in central, eastern and northern Maine served by the Penobscot Energy Recovery Company ("PERC"), each of which implements its solid waste management with long-term put-or-pay contracts (i.e., contracts in which a municipality guarantees to deliver a minimum amount of waste to a facility or to pay disposal fees of the entire guaranteed amount if less is delivered).

The management of solid waste has always been a function of State and local government. In the preamble to the Resource Conservation and Recovery Act of 1976 ("RCRA"), Congress found that the "collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies" Thus, Congress has examined the relationship between Federal and State governments and has concluded that State and local governments should bear the burden of and responsibility for providing environmentally sound solid waste management methods.

Many States, including Maine, now require each municipality to provide solid waste management services for the commercial and domestic waste generated within its borders. For example, Maine municipalities are required by law to:

- provide disposal services for domestic and commercial waste;
- demonstrate progress towards meeting the States goal of recycling 50 percent of the municipal solid waste generated each year by 1994; and
- report annually on how solid waste generated within each municipality's borders is being managed.

In addition, consistent with Federal policy, Maine's Legislature has established a policy for the State to plan for and implement an integrated approach to solid waste management, based on the following order of priority: reduction of waste generated at the source; reuse of waste; recycling of waste; composting of biodegradable waste; waste processing which reduces the volume of waste needing land disposal, including incineration; and land disposal of waste.

In recognition of the complex technology and high capital costs of integrated waste management systems, including energy recovery systems and other waste management technology, Maine's Legislature in 1983 provided legal authority to municipalities to adopt flow control ordinances that would direct the delivery of solid waste to a specific facility, in order to gain management control and enable the reclamation of resources, including energy, from the waste.

Within this statutory framework and in order to avoid the deficiencies of the traditional "town dump" and open burning areas, during the 1980s many municipalities in Maine formed regional entities which undertook extensive and costly studies of alternative approaches to solid waste management. As a result of such studies of alternatives, these regional entities adopted waste-to-energy technology as an environmentally sound way to dispose of solid waste as opposed to landfilling, and hundreds of millions of dollars were invested in such facilities. Flow control is vital to these facilities for two principal reasons. First, flow control ordinances provide the long-term predictability of waste volumes necessary to secure financing and to design, construct and operate solid waste management facilities for disposal and recycling. Second, these ordinances ensure a steady, reliable source of fuel, which is a

prerequisite to the stable operation of waste-to-energy facilities and the sale of electricity generated thereby to utilities under long-term agreements.

For example, 31 municipalities in the Portland area have jointly committed the waste generated within their borders and pledged their full faith and credit for financing of the publicly owned and operated RWS. Similarly, 12 municipalities in the Central Maine region have adopted flow control ordinances and pledged their solid waste to the publicly owned and operated MMWAC in Auburn.

Elsewhere, the experience in the State of Maine is that regional organizations of municipalities have developed approaches and solutions that have provided them with negotiating strength which attained very competitive pricing and helped to contain waste disposal costs. For example, the communities in the Penobscot Valley centered around the City of Bangor developed a request for proposals for a privately owned and operated waste to energy facility. This competitive designation process worked very well. They negotiated long term put-or-pay contracts resulting in the construction of the largest solid waste facility in the State at a cost of \$100,000,000. Ultimately, 160 communities came on board such that the facility serves 30 percent of the States population. These 160 communities have long-term put-or-pay contracts which provided the vehicle for private developers to borrow the significant capital required for PERC's construction of a solid waste facility for those municipalities. The present tipping fee is \$45.00 per ton. This large component of the regions solid waste management needs presently is being well served and should be allowed by Congress to continue to serve the needs of the public.

Also, a large number of municipalities in southern Maine entered into put-or-pay agreements and enacted flow control ordinances in support of financing of a similar private facility, Maine Energy Recovery Co. ("MERC"), in Biddeford.¹

Capital investment in these four facilities, which together serve over half the population of the State of Maine, is well in excess of \$300 million and is secured by the commitment of waste from the municipalities which they serve.

Solid waste flow control ordinances enable these municipalities to implement an integrated approach to solid waste management—one that accords with State and Federal solid waste management priorities that prefer waste reduction and recycling to other management methods. Municipal control over the solid waste stream permits not only the processing and disposal of solid waste at waste-to-energy facilities, but also the recycling of solid waste. Overall Maine's municipalities dispose of approximately 37 percent of their municipal solid waste through waste-to-energy, compared to the national average of 20 percent.

Yet, Maine's reliance upon waste-to-energy for disposal has not interfered with recycling. Indeed, Maine can boast one of the higher recycling rates in the nation; at present, at least 30 percent of municipal solid waste generated each year in Maine is recycled, and the State is progressing toward the goal of recycling 50 percent of the municipal solid waste generated each year. Furthermore, recycling by the private sector generally is market-driven—private industry will recycle that for which there is a market. If no market exists, private industry will not recycle the materials and they will remain in, or return to, the waste stream for disposal. By contrast, flow control enables municipalities to commit to recycling portions of the waste stream, regardless of market conditions, since they may thereby avoid the cost of disposal. Therefore, waste-to-energy and recycling are not mutually exclusive, but instead are both solid waste management objectives achieved by municipalities through flow control ordinances.

However, in order to implement integrated solid waste management systems facilities in Maine, significant amounts of indebtedness has had to be incurred for acquisition and construction of complex facilities, and the condition of financing required by lenders has been the adoption by municipalities of flow control ordinances or put-or-pay agreements. For example, prior to commencement of operations of the RWS waste-to-energy facility in 1988, landfilling was the primary means of solid waste disposal used by each of its member municipalities. Currently, through reliance on flow control, RWS has initiated a comprehensive solid waste management plan, providing not only resource recovery at the facility, but also: (1) recycling services, with containers owned by RWS and available in all its communities; (2) landfilling for by-pass waste at a landfill owned by RWS; (3) disposal of ash residue from

¹The municipalities that entered into put-or-pay agreements with PERC and MERC have chosen to establish partnerships with the private sector for the development of facilities to meet their solid waste disposal needs. They entered into such agreements with the understanding that existing law supported their ability to enact and enforce flow control ordinances; thus, while not all of the municipalities contracting with PERC and MERC have enacted flow control ordinances, they have relied on their ability to do so, if needed.

the facility at an ashfill owned by RWS; (4) composting of yard waste; and (5) educational services for schools and community organizations.

Flow control ordinances have also resulted in a user-funded system whereby the actual user—either a city or town or a private solid waste hauler—which brings waste to the facility, pays the tipping fee for disposal of the waste. Thus, flow control ordinances have been a critical tool to permit the financing of waste-to-energy facilities and other solid waste management systems in Maine, such as recycling and composting facilities and landfills, without sole reliance on the local property tax base.

The ability of local governments to develop and implement these integrated solid waste management programs—which are often mandated by State and Federal directives—is in jeopardy because of the controversy surrounding the validity of flow control. The Commerce Clause of the U.S. Constitution limits the ability of States to enact laws that impose more than an incidental burden on interstate commerce unless Congress expressly authorizes the States to do so.

The recent decision of the United States Supreme Court in *C&A Carbone, Inc. v. Town of Clarkstown* raises fundamental questions about the validity of solid waste flow control ordinances. This case involved a private solid waste processors appeal from a decision of the Appellate Division of the Supreme Court of New York upholding the Town of Clarkstown's flow control ordinance. Clarkstown enacted its flow control ordinance to guarantee sufficient waste volume for a transfer station that was constructed and is operated by a private entity. After 5 years of private operation, the transfer station was to be conveyed to the Town for \$1.00. This flow control ordinance requires all nonhazardous solid waste generated within the Town and generated outside the Town but transported through it to be brought to the transfer station for processing. C&A Carbone, Inc. owns and operates a recycling facility in the Town of Clarkstown. While the Town's flow control ordinance allows C&A Carbone to continue its recycling operations, the ordinance also requires it to process all nonrecyclable waste residue through the Town's transfer station rather than shipping the residue directly for disposal. When Clarkstown learned that C&A Carbone was shipping residue directly for disposal rather than through the Town's transfer station, the Town sought to enjoin C&A Carbone, and this litigation ensued.

A five-justice majority of the U.S. Supreme Court held that a municipality cannot enact and use a discriminatory ordinance to favor local enterprise. (Justice O'Connor concurred in the result but for a different reason, and so the actual decision is by a six-justice majority). The Supreme Court reversed the New York Appellate Divisions decision and remanded the case for further proceedings consistent with the test the Court established in this decision: "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid" except for "a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." In order to meet this test, a local government will have to make "the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem."

In the aftermath of the *Clarkstown* decision, there exists a cloud over all existing flow control ordinances and the intricately designed financing for those facilities which rely on such ordinances. Without flow control, there is no certainty that solid waste will be directed to facilities constructed by public funds in reliance on a municipality's ability to direct solid waste to those facilities. Thus, facilities, built and operated in accordance with Federal and State mandates, could become underutilized and represent a significant financial burden on municipal budgets, at a time when the local property tax base already is strained. In addition, municipalities which have guaranteed the delivery of waste under put-or-pay agreements with privately owned facilities may find that they are unable to meet their delivery obligations and must pay for any shortfall out of general revenues. Moreover, if local flow control ordinances ultimately are invalidated by courts following the *Clarkstown* opinion, municipalities which have been enforcing these ordinances in good faith may be liable for damages, attorneys fees and costs under Federal civil rights statutes.

The U.S. Supreme Court's opinion in *Clarkstown* has created a situation that requires immediate Federal legislation to validate municipal flow control authority. Justice O'Connor wrote in her concurring opinion that she agreed "that Congress expected local governments to implement some form of flow control," but that she could find no explicit authorization by Congress of such local authority that would prevent application of the dormant Commerce Clause in that case. Justice O'Connor therefore observed:

It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course defer to that legislative judgment.

It is imperative that Congress enact legislation to clarify the authority of local governments to use flow control as part of their overall solid waste management programs. Invalidation of the authority to adopt flow control ordinances not only would threaten the regional solid waste management decisions made by well over 200 Maine municipalities and hundreds more across the country, but also would jeopardize over \$300 million in indebtedness incurred in Maine and billions of dollars incurred nationally which is currently outstanding for construction of waste-to-energy, recycling, composting and other facilities utilized by these municipalities in meeting their Federal and State solid waste mandates.

We support S. 2227 because it represents sound public policy and because:

- S. 2227 will satisfy the Supreme Court's dormant Commerce Clause test;
- S. 2227 grandfathers existing flow control ordinances and municipal agreements which direct waste to a designated facility in order to validate those projects which were planned and constructed in reliance on the enforceability of flow control and waste designation agreements.
- S. 2227 authorizes flow control ordinances retroactively to the date of their initial adoption in order to avoid civil claims for damages and attorney's fees against municipalities that have enforced their flow control ordinances in good faith to maintain the integrity of their solid waste management systems.
- S. 2227 requires no Federal expenditures or appropriations.

We believe that the provisions of S. 2227 can be clarified by adding the following:

- Communities with put-or-pay agreements prior to May 15, 1994 should be afforded grandfathered status and provided general authority to enact ordinances: (1) for both residential and commercial waste, and (2) without undertaking the competitive facility designation process where a facility designation already has occurred. Protection of existing put-or-pay agreements is necessary to preserve solid waste disposal arrangements that have been negotiated and implemented both in Maine and across the nation. These communities should be granted the authority to enact flow control ordinances in order to comply with pre-existing put-or-pay contractual agreements and thereby retain the substantial benefits of those agreements.

- So long as a municipality or State government subdivision already has management control over the residential and commercial waste streams by virtue of contracts or agreements entered into or laws or ordinances enacted prior to May 15, 1994, that municipality or subdivision should be permitted to take the following actions without losing control over the commercial waste stream or having to undertake a competitive facility designation process:

- 1) Designate new or replacement facilities for the transportation, processing and disposal of those same waste streams; and

- 2) Amend the grandfathered contracts, agreements, laws and ordinances, so long as the purpose of the amendments is not to gain management control over new residential or commercial waste streams.

- The competitive designation procedure for new solid waste management facility designations (which may permit use of flow control) should be clarified and streamlined to become more straightforward in application and to eliminate ambiguities that will lead to litigation, with its attendant costs and delays.

We are very concerned that without action by Congress during this session, judicial invalidation of flow control will undermine the efforts of Maine municipalities to meet their obligations to provide long-term, environmentally sound solid waste management solutions.

Therefore, on behalf of the State of Maine and its many communities which are striving to provide environmentally sound solid waste management solutions, we strongly urge the subcommittee to report favorably on flow control legislation as soon as possible.

Governor John R. McKernan, Jr.
Office of the Governor
State House Station 1
Augusta, ME 04333
(207) 287-3531

Gary Lorfano, Chairman
Regional Waste Systems, Inc.
64 Blueberry Road
Portland, ME 04102
(207) 773-6465

Sherry Huber, Director
Maine Waste Management Agency
State House Station 154
Augusta, ME 04333
(207) 287-5300

Steven Libby, President
Mid-Maine Waste Action Corporation
One Goldthwaite Road
P.O. Box 1750
Auburn, ME 04211-1750
(297) 783-8805

Christopher Lockwood
Executive Director
Maine Municipal Association
60 Community Drive
Augusta, ME 04330
(207) 623-8428

Don Meagher
Municipal Review Committee, Inc.
Eastern Maine Development Corporation
P.O. Box 2579
Bangor, ME 04402-2579
(207) 942-6389

STATEMENT OF ROBERT D. PRUNETTI, COUNTY EXECUTIVE, MERCER COUNTY, NEW JERSEY

There is still a municipal solid waste crisis. Americans generate 195.7 million tons of municipal solid waste per year and this is expected to grow to 222 million tons by the year 2000.¹ The U.S. Environmental Protection Agency has noted that "[a]s a nation we are generating more garbage all of the time, and we don't know what to do with it."² While States and local governments search for ways to reduce waste (waste minimization) and recycle, "market forces" absent government intervention dictate that municipal solid waste be disposed at the lowest cost, short term alternative—landfilling. As these pressing issues confront States and local governments in the 1990s, Congress continues to debate Superfund reauthorization to continue the decades-long job of cleaning up the billions of dollars of mistakes and serious environmental problems left to the taxpayers by the unregulated "free market" solid waste system of the 1930s-1980s. To even debate the right of State and local governments to properly manage and regulate municipal solid waste is ironic and tragic.

Congress in 1976 adopted the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. ("RCRA"). RCRA was the first Federal law regulating waste and represents a comprehensive Federal regulatory program to manage hazardous waste. Congress intentionally left planning, transportation and disposal of municipal solid waste to States and local government.

Provisions for the management of municipal solid waste are set forth in Subtitle D of RCRA (§§4001-4010). In contrast to the statutory framework for the management of hazardous waste under Subtitle C, the role of the Federal government under Subtitle D is confined to providing assistance, encouragement, and facilitation in the States' efforts to manage the municipal solid waste problem. The basic structure of Subtitle D consists of the development of municipal solid waste management plans ("plans") by States pursuant to Federal guidelines (RCRA §4002) promulgated by EPA (40 C.F.R. Part 256). EPA is authorized to provide financial assistance to States and local governments in implementing their plans provided that such plans have been approved by the Agency. (RCRA §4007(b)). To be approved by EPA, plans must contain at a minimum provisions: (1) identifying the organizational structure in the State for implementing the plan; (2) prohibiting new open dumps; (3) requiring that all solid waste either be utilized for resource recovery, disposed in a sanitary landfill, or disposed in an environmentally sound manner; (4) closing or upgrading existing open dumps consistent with EPA standards under RCRA; (5) establish-

¹U.S. Environmental Protection Agency ("EPA"), Characterization of Municipal Solid Waste in the United States; 1992 Update, EPA/530-R-92-019, ("1992 Update").

²The Solid Waste Dilemma: An Agenda for Action, EPA/530-SW-9-019 (February 1989) ("Agenda for Action").

ing adequate regulatory powers; (6) preserving the authority to enter into long-term contracts for the supply of municipal solid waste to, and operation of, resource recovery facilities, and for securing long-term markets for material and energy recovered from such facilities; and, (7) environmentally sound integrated waste management. (RCRA §4003).

RCRA's present scheme for municipal solid waste can be summarized as follows:

- (1) States and local governments are ultimately responsible for managing municipal solid waste (MSW),
- (2) MSW includes solid waste generated by residential sources and similar waste generated from commercial, institutional, and industrial sources, and
- (3) MSW is to be managed pursuant to a pro-environment hierarchy with preferences given to source reduction, followed by recycling, composting, combustion and lastly landfilling.

Despite all the misleading allegations by the waste management industry, States and local governments were thrust into municipal solid waste management due to the lack of a Federal policy. States that adopted comprehensive laws strictly controlling municipal solid waste did so to address serious public problems. For some States, government intervention was necessary to promote composting, recycling and waste to energy. For other States, government intervention was necessary to ensure safe, proper disposal without the threat of Superfund liability. For still other States, particularly in the East and Northeast, government intervention was necessary to avoid a waste disposal crisis. In these States, waste disposal capacity in the 1980s was scarce to nonexistent, and prices for disposal rose from \$15.00 per ton in 1981 to \$65.00 per ton in 1985, or greater than 400 percent in 4 years.³

Municipal solid waste remains a serious environmental and public health threat. States and local governments that regulate municipal solid waste are not in the business to make profit. These States and local governments are performing an essential police power function by providing proper planning and implementation of specific and predictable long-term municipal waste management systems. Indeed, in States that have imposed comprehensive planning responsibility on local government, the development of environmentally advanced waste management systems has proven very costly. For many local governments, municipal waste management has become one of their fastest growing costs.⁴

The system of flow control now under assault in my State, New Jersey, is an integral part of New Jersey's solid waste management plan, laws and regulations adopted to deal with the "garbage crisis" of the 1970s and 1980s. The image of New Jersey was trashed along with our beaches and our open spaces as landfills closed and illegal dumpers made a killing polluting our land and our water. Beginning in 1975, our State addressed the garbage crisis by passing a series of laws and regulations including the Solid Waste Management Act and Solid Waste Utility Control Act.

Each county is required to adopt and implement a comprehensive and integrated municipal solid waste management system including, in order of priority: recycling (50 percent mandate for residential waste stream by the year 1997 and 60 percent mandate for municipal waste stream by the year 1995); composting; household hazardous waste collection; public education; and, long-term, in-State disposal to attain self sufficiency. Since 1975, each and every county has made the investment of time and money to build comprehensive waste management systems to recycle 60 percent of the municipal waste stream and to become self sufficient. The planning process by each county was, by State law, open, competitive and fair. Indeed, many counties including Mercer spent 10 years in planning because of the openness of the process, and the special interest groups, including industry, who lobbied first at the county level, then at the State level, and thereafter in the courts. Today, New Jersey has invested \$7 billion in sound municipal waste planning and is well on its way to attaining self sufficiency and 60 percent recycling of the municipal waste stream.

The investment by States and local governments throughout the country in sound municipal waste management exceeds \$43 billion. These costs have been incurred for planning, contracting and implementation of integrated municipal waste management systems which include recycling, composting, household hazardous waste, education, waste to energy and landfilling. In the vast majority of these States and

³See, e.g., Commonwealth of Pennsylvania, Department of Environmental Resources, Bureau of Waste Management, Division of Waste Minimization and Planning, Average Landfill Fees for Municipal Solid Waste in Pennsylvania, 1985-1993, February 1994.

⁴Office of Technology Assessment, "Facing America's Trash: What Next for Municipal Solid Waste?" October, 1989.

local governments, private waste companies own and/or operate the facilities and are the provider of municipal waste services from transportation to disposal.

Mercer County, New Jersey is a prime example of an integrated municipal waste management plan and system to properly deal with a serious problem. A brief synopsis of the origin and chronology of Mercer County's municipal waste management plan and system is instructional:

1980: Municipal waste crisis hits New Jersey and Mercer County as landfill capacity decreases and prices escalate.

1984: Short term (3 year) disposal contract with Waste Management of Pennsylvania, Inc. to dispose of 350,000 tons annually of residential, commercial and institutional waste.

1988: Adoption of Municipal Solid Waste Management Plan to implement comprehensive, integrated waste management system consisting of: curbside recycling (wood, paper, plastic, grass, steel, aluminum, bi-metallic, newsprint, batteries, and tires); composting of municipal waste and leaf and yard waste; household hazardous waste collection and disposal; an aggressive consumer educational program; waste to energy facility; and, landfilling.

1988: Long term (25 year) disposal contract with Waste Management of Pennsylvania, Inc. to reserve capacity for disposal of municipal solid waste until permitting and construction of waste to energy facility, and thereafter for disposal of ash and bypass waste. \$30 million paid to WMI to reserve capacity.

1988-1994: Ogden Martin selected as waste to energy vendor. State permitting for air, water, and solid waste.

1989-1994: \$200 million in public financing; \$71 million spent to date to implement comprehensive municipal waste management system.

1991 to present: 63 percent of the County's municipal waste stream recycled.

1994: Permits issued to construct waste to energy facility. *Carbone* calls entire waste management system into question. \$71 million at risk.

The Mercer County integrated system is superior and comports with RCRA's hierarchy for municipal solid waste management—recycling, composting, waste-to-energy and landfilling. Beginning in 1991, Mercer recycled 63 percent of the municipal waste stream, which it could not have done without flow control. The selection of long term disposal capacity was the subject of no less than 30 public hearings and the result of an extremely competitive requests for proposal (RFP) process. It is private industry that provides the current and long term transportation and disposal service to Mercer County residents, commercial and industrial establishments and public and private institutions.

The playing field was radically upset by the *Carbone* decision. At present, no less than 8 *Carbone* type suits have been filed against counties and the State of New Jersey requiring an inordinate and unnecessary diversion of public resources to defend. Suddenly, the plans made by Mercer County over almost 2 decades are threatened with judicial extinction. The more than \$70 million spent in planning, implementing and developing the system now in place, and the \$200 million in bonds sold to build the waste management infrastructure and facilities, are in jeopardy. The decision and the lawsuits have caused Wall Street to be apprehensive about the credit rating of our bonds because the system was structured to pay for the facilities' costs. Other counties in New Jersey and throughout the country have been placed on negative watch or their bonds downgraded by Moody's and Standard & Poors. The financing problems are just the beginning. Without flow control, components like Mercer County's extensive and successful curbside recycling program, household hazardous waste program, and public educational programs may need to be canceled. Will all of these "loss leader" waste management programs, which are an integral part of New Jersey's waste management program, be picked up by the top 4 waste management companies which oppose flow control?

Mercer County, New Jersey is not alone. It is joined by all 21 New Jersey counties and the Hackensack Meadowlands Solid Waste District for a combined public investment for sound municipal waste management in excess of \$7 billion. It is also joined by Snohomish County, WA; Brookhaven, NY; Riverside, CA; Fresno, CA; Connecticut Resources Recovery Authority, CN; San Diego County, CA; Springfield, MO; City of Akron, OH; Delaware County, PA; York County, PA; Greater Detroit Resource Recovery Authority, MI; Beaumont, TX; Hamilton County, OH; Indianapolis-Marion County, ID; Minnesota Resource Recovery Association, MN; Montgomery County, OH; Solid Waste Authority of Central Ohio, OH; and Town of North Hempsted, NY, to name but a few.

The Supreme Court decision in *Carbone* was sound commerce clause jurisprudence, but sets horrendous public policy. We as a Society cannot afford to have municipal solid waste mismanaged by the "free market" system *again*. States and local

government need broad power and authority to plan and implement integrated municipal waste management systems. By necessity, this authority must include the power to flow control. Unless Congress is prepared to amend RCRA to itself regulate municipal solid waste, Congress must act now and adopt enabling legislation under the commerce clause.

While the initiatives of Representatives McMillan (H.R. 1357) and Minge (H.R. 2649) and Senators Heflin and Durenberger (S. 1634) represent the soundest public policy given the history of municipal waste management and mismanagement, competing interests and the shortage of time may dictate circumscribing the authority of States and local governments.

I thank Senator Lautenberg for his efforts over the past 4 months, but S. 2227 is very problematic to Mercer County and New Jersey. First, it does not grant States and local governments clear authority to implement long term plans, or flow control authority over municipal solid waste to designated facilities. Second, it narrowly circumscribes prospective flow control authority to residential household waste, leaving commercial, institutional and industrial waste to the "free market." This represents approximately 60 percent of the waste stream in Mercer County alone and will have the effect of turning back the clock in municipal waste management to the year 1960. Third, it attempts to grandfather existing contracts and laws, but the language is not clear or concise. Fourth, the definitions (such as municipal waste and qualified political subdivision) are not consistent with existing State law and are too narrow. Finally, the bill is convoluted, vague, internally inconsistent and, as a result, will lead to unnecessary and costly litigation. I am requesting that you amend S. 2227 to address these concerns.

H.R. 4661 introduced by your colleagues in the House (Representatives Smith, Zimmer, Gallo, Saxton, and Torricelli) represents a legitimate compromise: it enables States and local governments to continue planning and implementing of municipal waste management systems to avoid catastrophic losses of \$43 billion incurred by political subdivisions to date, while at the same time gives the waste industry "free reign" in those States that have not yet invested in an extensive municipal solid waste management infrastructure. I request that the committee amend S. 2227 to comport with H.R. 4661.

Additional References

1. Comments of David Stoldt, Paine Webber, Inc. (letting waste flow control to a cheaper facility may simply be a short-term fix before that lower cost system has to make an investment in more expensive, environmentally advanced waste management facilities).

2. H.R. Rept. No. 1491, 94th Cong. 2d Sess. 34 1976.

3. House Subcommittee on Transportation and Commerce, 94th Cong. 2d Sess., "Symposium on Resource Conservation and Recovery," 105 (Subcomm. Print 1976).

4. 53 Fed. Reg. 36883, 36885 (1988)(EPA encourages State and local governments to "assume responsibility for the wastes generated within their jurisdiction").

5. 58 Fed. Reg. 37477, 37478 (1993) (EPA statements regarding local government need for flow control).

6. William K. Reilly, Administrator, EPA, Statement Before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, September 17, 1991.

7. U.S. EPA, "Variable Rates in Solid Waste: Handbook for Solid Waste Officials," EPA 910/9-90-012a (June 1990).



NATIONAL
RECYCLING
COALITION
INC.

1101 30TH Street, NW, Suite 305
Washington, DC 20007
202/625-6406
Fax 202/625-6409

July 12, 1994

The Honorable Frank R. Lautenberg
Chair, Subcommittee on Superfund, Recycling and Solid Waste Management
Committee on Environment and Public Works
United States Senate
506 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Thank you for the opportunity to submit comments on S. 2227, which authorizes flow control for municipal solid waste generated from household; commercial, industrial and institutional sources; and recyclable materials for which ownership has been voluntarily relinquished by the generator or owner. The U.S. Supreme Court has recently abolished a flow control ordinance in Clarkstown, N.Y., and recyclers, waste haulers, local government officials, and others are now awaiting guidance from Congress on the issue of who is responsible for managing solid waste.

Both the National Recycling Coalition (NRC) and the Recycling Advisory Council (RAC), a policy advisory board convened by NRC and partially funded by the U.S. Environmental Protection Agency, are interested in the issue of flow control as it affects recyclable materials and would like to provide input for your consideration.

NRC is a non-profit, membership organization representing over 4,000 members nationwide who are dedicated to maximizing recycling in order to reduce waste, conserve natural resources and energy and promote sustainable economic development. NRC's membership includes for profit and non-profit recyclers, local government recycling coordinators, state recycling officials, waste haulers, material recovery facility operators, environmental organizations and private corporations, as well as 30 affiliated state recycling organizations. Through a combined strategy of market development policy analysis and research, advocacy, consumer education and technical assistance, NRC is a leading national voice on recycling issues.

The RAC is an 18-member, blue ribbon panel made up of representatives from environmental and public interest groups, the recycling industry, business and industry, the public sector, and community recycling operations. Its mission is to examine the current status of recycling in the United States with the aim of recommending consensus public policies and private initiatives to increase recycling, consistent with the protection of public health and the environment. NRC and the RAC are independent voices on policy matters pertaining to recycling, and NRC and RAC positions on various policy matters may differ.

NRC does not currently have a position on flow control for municipal solid waste, but both NRC and the RAC agree that recyclable materials should not be defined as waste. In its *Cost-Effective Recycling Operations and Facilities* policy



135th Annual Congress & Exposition
National Recycling Coalition
September 26-28, 1994
Portland Oregon



Recycled paper: 60% pre-consumer, 15% post-consumer content

position, NRC states that source-separated, recovered materials diverted from municipal solid waste for which recycling markets exist should not be considered solid waste. Among its general recommendations to promote recycling, the RAC has approved the following policy statement on flow control. The RAC's policy is: "Flow control ordinances that restrict or prevent the movement or collection of materials for recycling or seek to determine the ownership of potentially recyclable materials should be discouraged. Recyclable items must be treated as items of commerce rather than waste materials."

Flow control of recyclables has become a contentious issue, as local governments must develop waste management plans for their municipalities, which usually include requirements for recycling rates. This type of mandate may automatically place recyclables in the category of "waste," as waste management plans often specify that a certain percentage of the solid waste stream must be recovered for the purpose of recycling. By defining recyclables as "waste," one may be inviting the opportunity to landfill or incinerate potentially valuable resources. Legislation on waste flow control should include definitions for "recyclable," "recyclable materials," and "recycled" which exempt recycling and recyclable materials from inclusion in the category of solid waste.

NRC's *Hierarchy of Recoverable Resource and Waste Management Preferences* policy states that source reduction, reuse and recycling conserve energy and natural resources, create employment opportunities and conserve landfill space, and waste disposal methods, such as incineration and landfilling, are less preferable. Clearly, until materials are discarded as unwanted refuse, they should not be considered part of the waste stream. Some members of NRC have noted that recyclables have the potential to enter the waste stream, but until they do, recyclable material should be excluded from consideration of waste and therefore from inclusion in waste flow control requirements. S. 2227 has addressed this concern to the extent that it limits the authority to flow control recyclables to situations where the generator or owner of the material voluntarily relinquished ownership of the material, and the state or local government assumes ownership.

However, there is concern from recyclers and waste management service companies that if flow control policies are enacted, recyclables that are not diverted from the waste stream may end up being disposed in the municipally designated landfills or incinerators, rather than being recycled. Flow control legislation should address this possibility and include provisions that provide an opportunity for the private waste management industry to separate these recyclables from solid waste at waste transfer stations.

Flow control can affect markets for recyclable materials, since flow control policies have the potential to distribute recyclable materials in areas where the markets for these materials may be underdeveloped or nonexistent. Recyclables should not be considered or handled differently from any other product which enjoys added value through the current system of commerce.

NRC's policy on *Establishing Access to Investment Tools for Recycling*

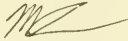
NRC Flow Control Testimony

Page 3

Projects states that innovative, large-scale recycling programs will require full funding to achieve their maximum potential. To expand their operations, private firms that use recovered materials require assurance that recycling collection programs can reliably supply large quantities of materials at consistently high levels of quality. Any policy the Congress adopts should take this into consideration.

Once again, thank you for providing the National Recycling Coalition with the opportunity to comment on S. 2227. We will continue to monitor the progress of all flow control legislation and look forward to seeing how Congress resolves this issue. Please do not hesitate to contact us with any questions that you may have in regards to our testimony.

Sincerely,



Mark Lichtenstein
President
National Recycling Coalition

cc: National Recycling Coalition Board of Directors
Clifford Case, Recycling Advisory Council Chair

STATEMENT BY HON. CHRISTOPHER H. SMITH, U.S. REPRESENTATIVE FROM THE STATE
OF NEW JERSEY

I would like to thank the Chairman and Ranking Member for holding this hearing on an issue which has been of great importance for States and localities—particularly those in Northeastern States, like New Jersey—and which has taken on an additional element of urgency in light of the Supreme Court's decision in *Carbone v. Clarkstown, NY*.

Waste flow control is an essential tool for localities and States in meeting the public health, safety, and environmental needs of their residents. The Court's May 16 decision rejected the use of these important instruments and left our partners in governance without the financial or regulatory means to safely and responsibly meet their solid waste management obligations.

Justice Sandra Day O'Connor spelled out in her concurring opinion for the *Carbone* case the appropriate resolution to this matter. Noting Congressional language in the Resource Conservation and Recovery Act of 1976 (RCRA) and its House Report (H. Rept. 94-1491), as well as in the Solid Waste Disposal Act of 1980, Justice O'Connor states, "that these references indicate that Congress expected local governments to implement some form of flow control. Nonetheless, they neither individually nor cumulatively me to the level of the "explicit" authorization required by our dormant Commerce Clause decisions Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment."

On June 28th, I introduced legislation to directly address what the Court sees as the deficiency which led to this problem—the Waste Flow Control Act of 1994 (H.R. 4661). Specifically, the bill provides a broad grandfather for all waste flow control laws, ordinances, provisions, related contracts and solid waste management plans that had been in effect prior to the Court's decision. Furthermore, it explicitly grants States and localities the authority to flow control all residential municipal solid waste generated within the borders of the State or locality in the future. The Waste Flow Control Act of 1994 also strengthens the public comment and competitive bidding procedures for future waste management plans. I am today submitting a summary of the legislation as well.

It is important to note that this bill, H.R. 4661, represents weeks of negotiations between those who support flow control—the local governments, public securities groups, and many independent waste hauling companies—and those who oppose it—mainly comprised of the largest companies in the waste hauling industry. The State of New Jersey—which has been long recognized as a trendsetter in solid waste management—played a substantial role in the drafting of this legislation as well. The coalition of local governments are willing to support the provisions of H.R. 4661—but we must recognize that it is a significant compromise. State and local governments have given in on prospective commercial waste flow control in an effort to advance the debate and pass a remedy to the crisis brought about by *Carbone*. H.R. 4661 locks in the pre-*Carbone* status of waste management, leaving the future open to new and often substantially different rules.

We need only look back a little more than a decade to see the tragic consequences of a wholly unregulated solid waste disposal system. The market fell back to the lowest cost alternative—as markets inevitably will—and this meant large, ever-expanding, unsafe, and unhealthy landfills. This clearly was not in the best interests of our environment, as the subsequent list of Superfund sites shows. Nor was this strategy consistent with the realities of a burgeoning population and dwindling public lands, particularly along the Eastern Seaboard.

Mr. Chairman, to fund the safe, sound, and environmentally progressive technologies as well as the successful and much-needed recycling programs which the public rightfully demands, States and localities have relied upon resource recovery bonds. The key to securing these bonds has always been flow control in one form or the other. Only by ensuring that there will be a steady flow of waste to the facilities at a determined tipping fee can the local government assure Wall Street that the venture is worthy of investment. The *Carbone* decision has left Wall Street highly skeptical of this kind of investment. In fact, the bond rating for Camden County, New Jersey has already suffered as a direct result of the *Carbone* decision. Allow me to repeat: recycling, composting, and other environmentally progressive technologies will not be advanced or secured if we abandon waste flow control.

My home State of New Jersey took charge of this matter by passing the Solid Waste Management Act in 1979. This farsighted measure established the 21 counties and the Hackensack Meadowlands as solid waste management districts with the

responsibility for disposing of solid waste and administering recycling programs within their boundaries. However, the *Carbone* decision threatens to shatter this successful system.

In my own district, Mercer County has developed a solid waste disposal plan which hinges on the construction of a waste-to-energy facility in Hamilton Township. The County has gone to great lengths to secure general public approval and to ensure that all relevant environmental standards are met or exceeded. In fact, the County has achieved a 63 percent recycling rate for its municipal waste stream—above the State's standard and 4 years prior to the State's deadline. Financing, however, depends on the sale of up to \$200 million worth of resource recovery bonds. In light of the recent Supreme Court decision, however, sale of these bonds has been put on hold and the preliminary construction deadline of July is unlikely to be satisfied. Not only is the County's highly successful curbside recycling program threatened; but also the waste management plan as a whole. Furthermore, County taxpayers face the prospect of additional taxes or reduced services to fulfill contract requirements for bonds already sold.

Burlington County, also in my district, faces a similar situation regarding its proposed sewage sludge composting plant. The plant is estimated to cost \$70 million and the County has already borrowed \$46 million from the State Wastewater Trust. However, financing is based on the assurance that sewage sludge from all 40 municipalities in Burlington County would be treated at the plant. Without this guaranteed revenue, the County may be forced to accept sludge from outside the County—thus breaking a longstanding promise to Burlington residents—or hike disposal fees which would inevitably mean higher local property taxes.

Scenarios like these are reflective of the other New Jersey counties as well. In all, New Jersey's 22 solid waste districts have accumulated more than \$1.6 billion in outstanding debt just trying to meet their obligations for waste management. And more than \$7 billion has been invested by New Jersey localities to achieve a self-sufficient and sound waste management system.

Situations similar to those I have just described also exist in Snohomish County, Washington; Brookhaven, New York; Lancaster County, Pennsylvania; Beaumont, Texas; and in many other localities throughout the country. Our constituents need our immediate assistance; only the Congress can remedy this matter.

I would like to stress as well, Mr. Chairman, the urgency of addressing this matter in light of the interstate waste flow legislation which this panel has already approved and which your House counterpart is slated to consider as early as next week. At one time, in stark contrast to its current situation, New Jersey was the leading importer of its neighbors' solid waste. The State became crowded, both with people and with landfills, and now New Jersey is the second largest exporter of waste over State lines. But through an integrated system of county waste flow control ordinances, the State expects to achieve self-sufficient solid waste management by the year 2000.

The State is gradually reducing its waste flow exports through the use of waste flow control within its borders. However, should an interstate waste flow bill be passed tightly restricting our waste export option over these crucial 6 years without the continued availability of broad waste flow control authority, New Jersey will be literally caught between a rock and a hard place. It will not be able to meet the needs of its citizens. It will not be able to meet the solid waste obligations which Congress has passed along to it.

Mr. Chairman, members of the subcommittee, I cannot state this strongly enough: waste flow control must go hand in hand with interstate waste flow legislation.

I encourage you to look carefully at the provisions of the legislation I have drafted in conjunction with the New Jersey Department of Environmental Protection and Energy and a coalition of county and local governments and securities organizations. It is a viable solution which satisfies the needs of the localities and the taxpayers they serve. Thank you.

THE WASTE FLOW CONTROL ACT OF 1994 (H.R. 4661)

- *Grandfather for States and Political Subdivisions that Have Relied on Flow Control.*

A) Allows continued flow control for residential, commercial, incinerator ash, construction or demolition debris, industrial, institutional waste, if adopted before May 15, 1994 (date of *Carbone* decision).

B) Protects source separation and recycling programs, if adopted before May 15, 1994.

- C) Protects all ordinances, laws, contracts, administrative/legislative provisions, including solid waste management plans, adopted before May 15, 1994.
- D) Protects all existing and planned facilities.
- *Clearly states that waste flow control is a reasonable regulation of commerce, retroactive to the effective date of the contract or agreement or date of adoption of any law, ordinance, regulation, legislative/administrative provision.*
- *Congressional Grant of Authority to States for Prospective Waste Flow Control.*
 - A) Gives states and qualified political subdivisions permission to flow control residential waste, including:
 - 1) from a single or multifamily residence;
 - 2) from an apartment or condominium;
 - 3) from a hotel or motel.
 - B) Gives states and qualified political subdivisions authority to control destination of recyclables, if:
 - 1) the materials are relinquished voluntarily;
 - 2) the State or qualified political subdivision assumes responsibility for the materials.
 - C) Allows the designation of waste management facilities.
- *Contingencies for Prospective Waste Flow Control.*
 - A) State or political subdivision must establish a source separation program for recycling, reclamation, and reuse.
 - B) Designation process for waste management facilities must include 1 or more public hearings and a written explanation.
- *Competitive Bidding Process for Prospective Waste Flow Control.*
 - A) Designation process must be a part of a long-term municipal solid waste management strategy.
 - B) Goals of the designation process must at least include:
 - 1) capacity assurance;
 - 2) provisions to protect human health and environment;
 - 3) additional goals determined to be relevant to State or qualified political subdivision.
 - C) Identifies/compares reasonable and available alternatives.
 - D) Provides for public participation and comment.
 - E) Provides for an open competitive process for designation, including:
 - 1) in writing, criteria to be utilized in selection;
 - 2) opportunity for private and public persons to offer their existing or proposed facilities;
 - 3) use of the merits of the facilities in selection.
- *Protects State procurement laws and Federal and State environmental standards relating to the disposal or management of solid waste or recyclables.*

103^D CONGRESS
2^D SESSION

S. 2227

To amend the Solid Waste Disposal Act to provide congressional authorization of State control over transportation of municipal solid waste, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 21 (legislative day, JUNE 7), 1994

Mr. LAUTENBERG (for himself and Mr. MITCHELL) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Solid Waste Disposal Act to provide congressional authorization of State control over transportation of municipal solid waste, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Flow Control Act of
5 1994".

1 **SEC. 2. CONGRESSIONAL AUTHORIZATION OF STATE CON-**
2 **TROL OVER TRANSPORTATION OF MUNICI-**
3 **PAL SOLID WASTE.**

4 (a) IN GENERAL.—Subtitle D of the Solid Waste Dis-
5 posal Act (42 U.S.C. 6941 et seq.) is amended by adding
6 at the end the following new section:

7 **“SEC. 4011. CONGRESSIONAL AUTHORIZATION OF STATE**
8 **CONTROL OVER TRANSPORTATION OF MU-**
9 **NICIPAL SOLID WASTE.**

10 “(a) AUTHORITY.—

11 “(1) IN GENERAL.—Each State and each quali-
12 fied political subdivision may, in accordance with
13 this section—

14 “(A) direct, limit, regulate, or prohibit the
15 transportation of municipal solid waste gen-
16 erated from household sources (as described in
17 subsection (g)(2)(A)(i)) within the boundaries
18 of the State or subdivision and designate each
19 waste management facility to which any such
20 municipal solid waste shall be transported;

21 “(B) direct, limit, regulate, or prohibit the
22 transportation of municipal solid waste that is
23 generated, or is commingled with municipal
24 solid waste that is generated, from commercial,
25 institutional, or industrial sources within the
26 boundaries of the State or subdivision, or that

1 is incinerator ash from a solid waste inciner-
2 ation unit, or construction debris or demolition
3 debris, generated within the boundaries of the
4 State or subdivision (referred to in this sub-
5 paragraph as 'covered waste') and designate
6 each waste management facility to which any
7 such covered waste shall be transported, if, be-
8 fore May 15, 1994—

9 “(i) the State or subdivision adopted
10 a law, ordinance, regulation, or legislative
11 or administrative provision that pertains to
12 the transportation of municipal solid waste
13 generated within the boundaries; and

14 “(ii) directed, limited, regulated, or
15 prohibited the transportation of covered
16 waste under the law, ordinance, regulation,
17 or provision to a facility designated before
18 such date; and

19 “(C) direct, limit, regulate, or prohibit the
20 transportation of recyclable materials generated
21 within the boundaries of the State or subdivi-
22 sion and designate each facility to which any
23 such materials shall be transported.

24 “(2) APPLICATION.—A State or qualified politi-
25 cal subdivision may exercise the authority described

1 in paragraph (1)(C) with respect to recyclable mate-
2 rials only if—

3 “(A) the generator or owner of the mate-
4 rials voluntarily made the materials available to
5 the State or qualified political subdivision and
6 relinquished any rights to, or ownership of,
7 such materials; and

8 “(B) the State or qualified political sub-
9 division, or the designee of the State or quali-
10 fied political subdivision, assumes such rights
11 to, or ownership of, such materials.

12 “(b) LIMITATIONS.—A State or qualified political
13 subdivision may exercise the authority provided by sub-
14 section (a) only if the State or qualified political
15 subdivision—

16 “(1) before exercising the authority described in
17 subsection (a)(1)(A) with respect to municipal solid
18 waste described in subsection (a)(1), establishes a
19 program to separate, or divert at the point of gen-
20 eration, the materials described in subsection (g)(4)
21 from the municipal solid waste, for purposes of recy-
22 cling, reclamation, or reuse, in accordance with any
23 State law or municipal solid waste planning require-
24 ments in effect;

1 “(2) develops and implements a process de-
2 scribed in subsection (c) for the designation of facili-
3 ties described in subsection (a); and

4 “(3) after conducting 1 or more public
5 hearings—

6 “(A) finds, on the basis of the record de-
7 veloped at the hearing or hearings that it is
8 necessary to exercise the authority provided by
9 subsection (a) to meet the current solid waste
10 management needs (as of the date of the
11 record) and anticipated solid waste manage-
12 ment needs of the State or qualified political
13 subdivision for management of municipal solid
14 waste or recyclable materials; and

15 “(B) provides a written explanation of the
16 reasons for the finding described in subpara-
17 graph (A).

18 “(e) COMPETITIVE DESIGNATION PROCESS.—In de-
19 veloping and implementing the designation process de-
20 scribed in subsection (b)(2) or (c)(4) with respect to waste
21 management facilities and facilities for recyclable mate-
22 rials, the State or qualified political subdivision shall—

23 “(1) ensure that the designation process is
24 based on, or is part of, a municipal solid waste man-
25 agement plan that is adopted by the State or quali-

1 fied political subdivision and that is designed to en-
2 sure long-term management capacity for municipal
3 solid waste or recyclable materials generated within
4 the boundaries of the State or subdivision;

5 “(2) set forth the goals of the designation proc-
6 ess, including at a minimum—

7 “(A) capacity assurance;

8 “(B) the establishment of provisions to en-
9 sure that protection of human health and the
10 environment will be achieved; and

11 “(C) any other goals determined to be rel-
12 evant by the State or qualified political subdivi-
13 sion;

14 “(3) identify and compare the alternatives and
15 options for designation of the facilities;

16 “(4) provide for public participation and com-
17 ment;

18 “(5) ensure that the designation of the facilities
19 is accomplished through an open competitive process
20 during which the State or qualified political
21 subdivision—

22 “(A) identifies in writing the specific cri-
23 teria to be utilized for selection of the facilities;

24 “(B) provides an opportunity for interested
25 public persons and private persons to offer their

1 existing (as of the date of the process) or pro-
2 posed facilities for designation; and

3 “(C) evaluates and selects the facilities for
4 designation based on the merits of the facilities
5 in meeting the specific criteria identified; and

6 “(6) base the designation of each such facility
7 on reasons that shall be stated in a public record.

8 “(d) OWNERSHIP OF RECYCLABLE MATERIALS.—

9 “(1) PROHIBITION ON REQUIRED TRANS-
10 FERS.—Except as provided in paragraph (3), noth-
11 ing in this section shall authorize any State or quali-
12 fied political subdivision to require any generator or
13 owner of recyclable materials to transfer any recycla-
14 ble materials (other than abandoned or discarded
15 materials) to such State or qualified political sub-
16 division.

17 “(2) PROHIBITION ON PROHIBITED TRANS-
18 ACTIONS.—Except as provided in paragraph (3),
19 nothing in this section shall prohibit any generator
20 or owner of recyclable materials from selling, pur-
21 chasing, accepting, conveying, or transporting any
22 recyclable materials for purposes of transformation
23 or remanufacture into usable or marketable mate-
24 rials, unless the generator or owner voluntarily made
25 the materials available to the State or qualified po-

1 litical subdivision and relinquished any rights to, or
2 ownership of, such materials.

3 “(3) LAW AND CONTRACTS.—A contract, law,
4 ordinance, regulation, or provision described in sub-
5 section (e)(1) may contain an authorization de-
6 scribed in paragraph (1) or a prohibition described
7 in paragraph (2).

8 “(e) EXISTING LAWS AND CONTRACTS.—

9 “(1) IN GENERAL.—This section shall not su-
10 persede, abrogate, or otherwise modify any of the
11 following:

12 “(A) Any contract or other agreement (in-
13 cluding any contract containing an obligation to
14 repay the outstanding indebtedness on any fa-
15 cility) entered into before May 15, 1994, by a
16 State or qualified political subdivision in which
17 such State or qualified political subdivision has
18 designated a waste management facility, or
19 management facility for recyclable materials,
20 for the management of municipal solid waste or
21 recyclable materials pursuant to an ordinance
22 or law adopted by such State or qualified politi-
23 cal subdivision before May 15, 1994.

1 “(B) Any other contract or agreement en-
2 tered into before May 15, 1994, for the man-
3 agement of municipal solid waste.

4 “(C)(i) Any law, ordinance, regulation, or
5 legislative or administrative provision—

6 “(I) that is adopted before May 15,
7 1994; and

8 “(II) that pertains to the transpor-
9 tation of municipal solid waste generated
10 within the boundaries of a State or quali-
11 fied political subdivision;

12 to the extent that the law, ordinance, regula-
13 tion, or provision is applied to the transpor-
14 tation of municipal solid waste, generated from
15 household sources (as described in subsection
16 (g)(2)(A)(i)) within the boundaries, to a facility
17 designated before such date under such law, or-
18 dinance, regulation, or provision.

19 “(ii) Any law, ordinance, regulation, or leg-
20 islative or administrative provision—

21 “(I) that is adopted before May 15,
22 1994;

23 “(II) that pertains to the transpor-
24 tation of municipal solid waste generated

1 within the boundaries of a State or quali-
2 fied political subdivision; and

3 “(III) under which a State or quali-
4 fied political subdivision; prior to May 15,
5 1994, directed, limited, regulated, or pro-
6 hibited the transportation of municipal
7 solid waste that is generated, or is com-
8 mingled with municipal solid waste that is
9 generated, from commercial, institutional,
10 or industrial sources within the boundaries,
11 or that is incinerator ash from a solid
12 waste incineration unit, or construction de-
13 bris or demolition debris, generated within
14 the boundaries;

15 to the extent that the law, ordinance, regula-
16 tion, or provision is applied to the transpor-
17 tation of municipal solid waste described in
18 subelause (III), to a facility designated before
19 such date under such law, ordinance, regula-
20 tion, or provision.

21 “(iii) Any law, ordinance, regulation, or
22 legislative or administrative provision—

23 “(I) that is adopted before May 15,
24 1994; and

1 “(II) that pertains to the transpor-
2 tation of recyclable materials generated
3 within the boundaries of a State or quali-
4 fied political subdivision;

5 to the extent that the law, ordinance, regula-
6 tion, or provision is applied to the transpor-
7 tation of recyclable materials, that are gen-
8 erated within the boundaries and with respect
9 to which the generator or owner of the mate-
10 rials, and the State or qualified political sub-
11 division, have met the appropriate conditions
12 described in subsection (a)(2), to a facility des-
13 ignated before such date under such law, ordi-
14 nance, regulation, or provision.

15 “(iv) Any law, ordinance, regulation, or
16 legislative or administrative provision—

17 · “(I) that is adopted before May 15,
18 1994;

19 “(II) that pertains to the transpor-
20 tation of recyclable materials generated
21 within the boundaries of a State or quali-
22 fied political subdivision; and

23 “(III) under which a State or quali-
24 fied political subdivision, prior to May 15,
25 1994, directed, limited, regulated, or pro-

1 hibited the transportation of recyclable ma-
2 terials that are not materials with respect
3 to which the generator or owner of the ma-
4 terials, and the State or qualified political
5 subdivision, have met the appropriate con-
6 ditions described in subsection (a)(2) and
7 that—

8 “(aa) are generated from house-
9 hold sources (as described in sub-
10 section (g)(2)(A)(i)) within the bound-
11 aries; or

12 “(bb) are generated from com-
13 mercial, institutional, or industrial
14 sources within the boundaries;

15 to the extent that the law, ordinance, regula-
16 tion, or provision is applied to the transpor-
17 tation of recyclable materials, described in
18 subclause (III), to a facility designated before
19 such date under such law, ordinance, regula-
20 tion, or provision, and is applied to the same
21 class of materials described in item (aa) or (bb)
22 of subclause (III) to which the law, ordinance,
23 regulation, or provision applied before such
24 date.

1 “(2) CONTRACT INFORMATION.—A part to a
2 contract or other agreement that is described in sub-
3 paragraph (A) or (B) of paragraph (1) shall provide
4 a copy of the contract or agreement to the State or
5 qualified political subdivision on request. Any propri-
6 etary information contained in the contract or agree-
7 ment may be omitted in the copy, but the informa-
8 tion that appears in the copy shall include at least
9 the date that the contract or agreement was signed,
10 the volume of municipal solid waste or recyclable
11 materials covered by the contract or agreement with
12 respect to which the State or qualified political sub-
13 division could otherwise exercise authority under
14 subsection (a), the source of the waste or materials,
15 the destination of the waste or materials, the dura-
16 tion of the contract or agreement and the parties to
17 the contract or agreement.

18 “(3) EFFECT ON INTERSTATE COMMERCE.—Ef-
19 fective from the date of its adoption, no contract or
20 agreement described in subparagraph (A) or (B) of
21 paragraph (1), and no law, ordinance, regulation, or
22 provision described in paragraph (1)(C), shall be
23 considered to impose an undue burden on or other-
24 wise impair, restrain, or discriminate against inter-
25 state commerce.

1 “(4) LIMITATION.—A State or qualified politi-
2 cal subdivision may exercise the authority of any
3 law, ordinance, regulation, or provision described in
4 paragraph (1)(C), to the extent provided in such
5 paragraph, only if the State or qualified political
6 subdivision develops and implements a process de-
7 scribed in subsection (e) for the designation of any
8 waste management facility or facility for recyclable
9 materials that the State or qualified political sub-
10 division designates, after the date of enactment of
11 this section, as a facility to which any waste or ma-
12 terials described in paragraph (1) shall be trans-
13 ported. Nothing in this paragraph shall affect any
14 designation made before the date of enactment of
15 this section.

16 “(5) EFFECT ON STATE PROCUREMENT
17 LAWS.—

18 “(A) IN GENERAL.—Except as provided in
19 subparagraph (B), nothing in this section shall
20 supersede or modify—

21 “(i) any State law or State regulation
22 concerning the procurement of municipal
23 solid waste services or facilities by qualified
24 political subdivisions; or

1 “(ii) any State law or regulation con-
2 cerning competitive bidding for such serv-
3 ices or facilities.

4 “(B) DESIGNATION.—Notwithstanding
5 subparagraph (A), any such facilities shall be
6 subject to the designation process described in
7 subsection(c).

8 “(6) DESIGNATION BEFORE A DATE.—For pur-
9 poses of this section, a facility shall be considered to
10 be designated before a date if—

11 “(A) the facility was designated before the
12 date in a written document; and

13 “(B) the terms and requirements of the
14 document, and of any laws and regulations of
15 the State or qualified political subdivision in-
16 volved, that were in effect and applicable to the
17 designation continue to apply.

18 “(f) SAVINGS CLAUSE.—Nothing in this section is in-
19 tended to supersede, amend, or otherwise modify Federal
20 or State environmental standards that apply to the dis-
21 posal or management of solid waste at waste management
22 facilities and facilities for recyclable materials.

23 “(g) DEFINITIONS.—As used in this section:

24 “(1) INDUSTRIAL SOLID WASTE.—The term ‘in-
25 dustrial solid waste’ means solid waste generated by

1 manufacturing or industrial processes, including
2 waste generated during scrap processing and recycling,
3 that is not hazardous waste regulated under
4 subtitle C.

5 “(2) MUNICIPAL SOLID WASTE.—

6 “(A) IN GENERAL.—The term ‘municipal
7 solid waste’—

8 “(i) means any waste generated by a
9 household, including a single or multifam-
10 ily residence;

11 “(ii) includes waste generated by a
12 commercial, institutional, or industrial
13 source to the extent that such waste—

14 “(I) is essentially the same as
15 waste normally generated by house-
16 holds; or

17 “(II) would be considered condi-
18 tionally exempt small quantity genera-
19 tor waste under section 3001(d) and
20 is collected and disposed of with other
21 municipal solid waste as part of nor-
22 mal municipal solid waste collection
23 services; and

24 “(iii) includes residue remaining after
25 recyclable materials have been separated,

1 or diverted at the point of generation, from
2 municipal solid waste described in clause
3 (i) or (ii).

4 “(B) EXCLUSIONS.—The term ‘municipal
5 solid waste’ shall not include any of the follow-
6 ing:

7 “(i) Hazardous waste required to be
8 managed in accordance with subtitle C
9 (other than waste described in subpara-
10 graph (A)(ii)(II), solid waste containing a
11 polychlorinated biphenyl regulated under
12 the Toxic Substances Control Act (15
13 U.S.C. 2601 et seq.), or medical waste.

14 “(ii)(I) A recyclable material.

15 “(II) A material or a product re-
16 turned from a dispenser or distributor to
17 the manufacturer or the agent of the man-
18 ufacturer for credit, evaluation, or reuse.

19 “(III) A material or product that is
20 an out-of-date or unmarketable material or
21 product, or is a material or product that
22 does not conform to specifications, and
23 that is returned to the manufacturer or the
24 agent of the manufacturer for credit, eval-
25 uation, or reuse.

1 “(iii) Any solid waste (including con-
2 taminated soil and debris) resulting from a
3 response action taken under section 104 or
4 106 of the Comprehensive Environmental
5 Response, Compensation, and Liability Act
6 of 1980 (42 U.S.C. 9604 or 9606) or a
7 corrective action taken under this Act.

8 “(iv)(I) Industrial solid waste.

9 “(II) Any solid waste that is gen-
10 erated by an industrial facility and trans-
11 ported for the purpose of containment,
12 storage, or disposal to a facility that is
13 owned or operated by the generator of the
14 waste, or a facility that is located on prop-
15 erty owned by the generator or a company
16 with which the generator is affiliated.

17 “(3) QUALIFIED POLITICAL SUBDIVISION.—The
18 term ‘qualified political subdivision’ means a govern-
19 mental entity of a political subdivision of a State if
20 a majority of members of the entity are elected offi-
21 cials and the entity has been granted authority by
22 the State to plan for, or determine the methods to
23 be utilized for, the collection, disposal, or other man-
24 agement of municipal solid waste generated within
25 the boundaries of the political subdivision.



1 “(4) RECYCLABLE MATERIAL.—The term ‘recy-
2 clable material’ means any material (including any
3 metal, glass, plastic, textile, wood, paper, rubber, or
4 other material) that has been separated, or diverted
5 at the point of generation, from solid waste for the
6 purpose of recycling, reclamation, or reuse.

7 “(5) WASTE MANAGEMENT FACILITY.—The
8 term ‘waste management facility’ means any facility
9 in which solid waste is collected, separated, stored,
10 transferred, treated, processed, or disposed of.”.

11 (b) TABLE OF CONTENTS.—The table of contents for
12 such subtitle D is amended by adding after the item relat-
13 ing to section 4010 the following new item:

“Sec. 4011. Congressional authorization of State control over transportation of
municipal solid waste.”.

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